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**In The  
United States Circuit Court of  
Appeals**

**FOR THE NINTH CIRCUIT,**

**May Session, 1918.**

Koke Co. of America,  
Southern Koke Co., Ltd.,  
Koke Co. of Texas,  
Koke Co. of Arkansas,  
Koke Co. of Oklahoma,  
Defendants-Appellants

**vs.**

The Coca-Cola Co.,  
Plaintiff-Appellee.

**No. 3012**

**Appeal from the  
United States  
District Court  
for the District  
of Arizona.**

**Schedules of Fact on Behalf of Defendants-  
Appellants.**

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Appellants.

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Under the pleadings, it was incumbent upon plaintiff to establish, by clear and convincing evidence, such facts as would support the conclusion that defendants are representing their goods to be of plaintiff's manufacture, —not, indeed, by direct representations to dealers, but by indirect representations made to the general public by means of the color and taste of their product, the "get-up" of their packages, and the words used on their crowns and labels as names for their goods. To provide a basis for such a conclusion, it was incumbent upon plaintiff to show clearly and convincingly that this color, taste, and "get-up," and that these names, indicate to the general public the origin or manufacture of the goods and amount to a representation that plaintiff is their maker. Such facts plaintiff has completely failed to establish.

Plaintiff has shown, without dispute, that its goods and defendants' goods have the same color and taste, but it has not established, and has not produced any evidence tending to establish, that this color and taste have any significance whatever to the general public as indicative of the origin or manufacture of the goods.

Plaintiff has shown, without dispute, that some of the several varieties of packages used by it and by defendants have certain features in common, but it has not established, and has not produced any evidence tending to establish, that these common features signify anything whatever to the general public regarding the origin or manufacture of the goods contained in the packages having those features.



Plaintiff has shown, without dispute, that defendants are using the words "Koke" and "Dope" on their crowns and labels as names for their goods, but it has not established, and has not even attempted to establish, that the presence of these words on defendants' crowns and labels ever has caused, or is likely ever to cause, anyone to mistake defendants' goods for those of plaintiff's manufacture.

Plaintiff has shown, without dispute, that the public generally use and employ numerous expressions, such as "coke," "dope," "shot," "eye-opener," "sniff," "needle," "hop," "slow-dope," etc., to indicate to soda dispensers the kind of drink they want, but it has not established, and has not produced any evidence tending to establish, that the general public use these various expressions, or any of them, to indicate the origin or manufacture of the goods thus asked for.

Plaintiff has completely failed, therefore, to establish any facts from which the conclusion could be drawn that defendants are making any misrepresentations to the general public as to the true origin of their goods, or that they are placing in the hands of retailers an 'instrument of fraud.' Nothing else plaintiff may have shown can possibly affect the decree that must be entered. Unless these facts be proven, there is no room for a charge of fraud or unfair competition.

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer, or vendor, for the goods of another, and if de-

fendant so conducts its business as not to palm off its goods for those of complainants, the action fails."—*Howe Scale Co. v. Wyckoff, Scams & Benedict*, 198 U. S. 118, 140.

Not only has plaintiff failed to show any title to relief, but the testimony overwhelmingly establishes the entire absence of any such right.

It is overwhelmingly established, without dispute, and admitted, that numerous soda water beverages having precisely the same color as plaintiff's product were in the market fifty years or more before plaintiff's product was even dreamed of; that numerous soft drinks having precisely the same color and taste have been on the market ever since plaintiff's product was first placed on sale; that defendants and their predecessors have continuously manufactured and marketed beverages having precisely the same color and taste ever since 1888; and that at the time the bill was filed in this cause almost "innumerable" beverages of the same color and taste were literally flooding the market; and hence that no one in his right mind would ever be fool enough to think he could tell whose manufacture a drink of this kind was simply by its color or taste.

It is overwhelmingly established, without dispute, and admitted, that barrels painted the same shade of red as plaintiff's barrels have been in universal use since time immemorial for all kinds and flavors of soda water syrups and extracts, and particularly for the "innumer-

able" different brands of cola drinks; that the color and shade of paint plaintiff uses on its barrels is, and has been for years, in general use for painting all kinds of cooperage; and that, as a consequence, no one with ordinary intelligence would be so foolhardy as to even venture a guess as to whose manufacture of soda water a barrel might contain merely because the barrel was painted that color; or, indeed, as to what kind, or flavor, of soda water it might contain, or as to whether or not it contained soda water syrup at all.

It is overwhelmingly established, without dispute, and admitted, that soda water bottles exactly like plaintiff's in size, color, shape, design, and general appearance, have been in universal use for all kinds and flavors of soda water since time out of mind, and certainly long before the aerated beverage made from plaintiff's syrup was ever marketed in bottles; that nearly all the "innumerable" brands of cola drinks are marketed in bottles of precisely that same kind; that plaintiff's own bottlers market numerous other soda water flavors of the same color as plaintiff's product in bottles not only substantially indistinguishable from the bottles they use for the beverage made from plaintiff's syrup, but in many cases in identically the same bottles; and hence that no one but a fool would hazard a wager as to whose manufacture of soda water a bottle might contain merely because it was a bottle having those features, or even as to what kind, or flavor, of soda water such a bottle might contain.

It is overwhelmingly established, without dispute, that dispensing bottles like those plaintiff furnishes to its dealers are made by machinery, in immense quantities, for general distribution, and are the only design so made; that they are used generally in the trade as receptacles for all the different brands and flavors of soda fountain syrups; and that, in consequence, no one who had ever patronized a soda fountain before would undertake to decide as to the manufacture of the syrup displayed in such a dispensing bottle merely from the size, color, shape, design, or general appearance thereof, or even as to the particular kind or flavor of syrup therein exhibited.

It is overwhelmingly established, without dispute, and admitted, that crowns having the same color, design, and style of lettering as those used on the bottles containing the aerated beverage made from plaintiff's syrup have been in general use, not only on the bottles containing the different kinds of flavors of soda water, and on the bottles containing the "innumerable" other brands of cola drinks, but even on bottles containing beer and other kinds of beverages,—notably "Budweiser" beer,—ever since decorated crowns first came into use; and hence that nobody would ever think of looking to the color, design, or style of lettering on the crown of a bottle to determine whose manufacture of soda water such bottle might contain,—or even the kind of drink contained therein.

It is overwhelmingly established, without dispute, that

none of the several kinds of labels used on the various different types of receptacles for defendants' product bears any sort of deceptive resemblance to any of the several kinds of labels used on the various different types of receptacles for plaintiff's product. The only basis for the charge that defendants have imitated plaintiff's labels is the fact that for a short period in 1913 a bottler in Dallas, Texas, and another in New Orleans, La., used a label on their bottles containing the aerated beverage made from defendants' syrup which resembled in size, color, shape, and in the wording around the periphery, the label then used by some of plaintiff's bottlers on the bottles containing the aerated beverage made from plaintiff's syrup. This label differed from plaintiff's label in its most prominent features,—namely, in the name of the product conspicuously displayed in the centre thereof ("Koke"), in the statement around the periphery as to the company under whose authority the stuff was bottled, (the "Koke Company of Texas" in one case, and the "Southern Koke Co., Ltd.", in the other), and in the signature of the president of the company ("W. McCarty Moore.") It was not shown that plaintiff's label was in any way distinctive. On the other hand, it was admitted that plaintiff had only been using that particular design of label since 1907, having previously used a red label instead. It was shown that labels of that shape are in general use, and that it is customary to print around the periphery the statement that the article is bottled under the authority of the manufacturer. The use of the label complained of was voluntarily discontinued by both the bottlers referred

to, at the suggestion of defendants, many months before this suit was brought, and a yellow and red label, which could not possibly be mistaken for any of plaintiff's labels, was adopted and has since been used in its stead. It was readily admitted that the former label had never in fact misled anyone, and, as its use has been wholly discontinued, there is no probability that it ever will.

It is frankly conceded that the use of the words "Koke" and "Dope" on defendants' crowns and labels has never misled, and is not likely ever to mislead, anyone into supposing that defendants' goods are plaintiff's goods, and it is overwhelmingly established, and admitted, that the slang expressions "coke," "dope," "shot," etc., are used by the public merely to describe generically the character of commodity desired, and not in any wise to designate any particular manufacture of that commodity; and hence that the sale of defendants' goods, or anybody else's goods, in response to requests for that sort of article by any of these expressions, could not constitute a sale thereof as and for plaintiff's manufacture, but only as and for the kind of stuff it actually is. All of plaintiff's "trade" witnesses readily admit either that these expressions are used simply to indicate the kind of drink that is wanted, without reference to its manufacture, or else that they are not in a position to know whether or not these expressions are so used by the public generally. None of them pretend to assert that they are not so used.

These admitted facts, coupled with the complete break-down of the attempt to show that defendants had



encouraged retailers to sell their goods as plaintiff's goods, and the utter collapse of the efforts to prove a fraudulent intent on the part of defendants, or actual substitution of their goods for plaintiff's, clearly evince the want of any foundation for this proceeding, and bring into strong relief the admitted fact that the purpose of this suit is not to prevent *unfair* competition, but *any* competition.

Under these circumstances it is not surprising to find plaintiff craftily trying to divert attention from the insufficiency and failure of its proof by all sorts of artful evasions, adroit sophistries, covert assumptions, reckless misstatements, aimless mud-slinging, and general "camouflage."

For instance, we find plaintiff trying to evade the issue by vigorously attacking the testimony [now no longer of any consequence since the drastic amendments to the bill (Rec., 113)] with respect to the time when defendants' predecessors first adopted and began to use the word "Koke" as a name for their product, and devoting practically its entire brief to a carefully inaccurate and purposely misleading distortion of that testimony, and a wholesale slinging of mud, just as though it could in any wise affect the result in this case whether defendants' predecessors adopted and began to use the word "Koke" in 1888 or in 1909. A finding either way would not entitle plaintiff to the relief it seeks,—it would not cure plaintiff's failure to establish that the color and taste of defendants' product, the "get-up" of their pack-

ages, and the use by them of the words "Koke" and "Dope" as names for their product, in any wise misrepresent the true origin or manufacture of their goods to plaintiff's damage, nor would it cure plaintiff's failure to prove that the sale of any goods other than those of its manufacture, in response to requests for "coke," "dope," "shot," etc., constitute a sale of such goods as its goods.

We find plaintiff seeking to draw the unwarranted conclusion that defendants are misrepresenting the origin of their goods, to its damage, and placing in the hands of retailers an "instrument of fraud," from the wholly insufficient premise that certain features of their goods and packages, which are old in the art and common to the trade and could not possibly misrepresent the maker of the goods because they have no sort of reference to origin or manufacture, are also possessed by plaintiff's goods, and that defendants' packages are labeled and branded with names not only having no deceptive resemblance to the name branded upon plaintiff's packages, but strikingly dissimilar thereto and readily distinguishable therefrom.

We find plaintiff seeking to draw the unwarranted conclusion that defendants' goods have been passed off by retail dealers as its goods, and that defendants have encouraged this practice, from the wholly insufficient premise that defendants' goods have been sold by retail dealers when that sort of drink was asked for by slang expressions indicating nothing more than that a drink



of that kind was wanted, and that defendants have advised dealers that they had a perfect right to sell their goods under those circumstances.

These are typical illustrations of the familiar falacy so well expressed by the phrase "non sequitur."

We find plaintiff, when confronted with the entire absence of any sufficient proof to sustain its case, passing swiftly over this minor detail with the airy assumption that unfair competition and "fraudulent trade practices" on the part of defendants have been "conclusively proved," "not even denied," and, indeed, "admitted," and then dwelling at length upon the consequences of the wrong thus covertly assumed to have been perpetrated, and vehemently denouncing that wholly imaginary wrong with a bewildering array of extravagant phrases designed to make up by way of assertion for what is lacking by way of proof.

This form of evasion is frequently met with in cases of this kind, and is such an old trick that none but the most unsophisticated could be justly expected to be ensnared by it.

To distract attention from the frantic way in which it has jumped about from pillar to post, asserting in one breath what is denied in the next, plaintiff accuses defendants of shifting positions and interposing inconsistent defenses. (Plaintiff's original brief, p. 51; supplemental brief, p. 16). But the only shift in position defendants have made has been such as was necessary to

meet the new theory of the case as presented by plaintiff's amendments to its bill (Rec., 113), or else to keep pace with the kaleidoscopic shiftings of position, without regard to consistency or candor, in which plaintiff has proven so resourceful.

In one breath plaintiff asserts that the words "Coca-Cola" are not a description of its product, but an arbitrary name, and hence a good trade-mark (supplemental brief, p. 12), and, in the next, that they are not only a description, but a truthful description, of its product, and hence not a deceptive mark (supplemental brief, p. 14).

In one breath, to avoid the charge that it did not have the exclusive use of either the word "Coca" or the word "Cola" during any portion of the ten years next preceding the passage of the Trade-Mark Act of 1905, plaintiff asserts that its alleged trade-mark does not consist of either of those words considered separately, but only in the specific combination "Coca-Cola" (supplemental brief, p. 25); and, in the next breath, to provide a ground of complaint the use by defendants of the word "Koke," it asserts that defendants have appropriated a word to which it has the exclusive right, because the sound of "Koke" is somewhat similar to the sound of the first syllable of the single word "Coca." (Supplemental brief, pp. 27 and 28).

In one breath plaintiff criticises defendants for wasting time in pointing out the fact that the words "Koke"

and "Dope" do not and cannot infringe the words "Coca-Cola" as a trade-mark (Supplemental brief, p. 27), asserting that this proposition is now of only academic interest in view of the amendments to the bill striking out all charges to the effect that these words infringe the words "Coca-Cola"; and, in the next breath, it not only asserts that the words "Koke" and "Dope" do infringe the words "Coca-Cola," (Supplemental brief, p. 28), but recklessly asserts that the fact of infringement has been finally and conclusively adjudicated between the parties and is now *res adjudicata* (supplemental brief, p. 8, et seq.). The question may or may not be *res adjudicata*, but if *res adjudicata*, the fact that has been adjudicated and set at rest is not that the words "Koke" and "Dope" infringe the words "Coca-Cola," but that they do *not* infringe them.

The Examiner of Interferences held that,—

"The opposer (the Coca-Cola Co.) has not established by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has ever been misled as a result of any deceptive similarity or resemblance between the marks 'Coca-Cola' and 'Koke' into a purchase of applicant's (the Koke Company of America's) goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark 'Koke' bears to the mark 'Coca-Cola.'"

This is the decision which was affirmed by the Commissioner of Patents and which is now asserted to be *res adjudicata*. The same conclusion was reached in *Coca-Cola Co. v. Branham*, 216 Federal, 264, in which case the decree was final, plaintiff's appeal having been dismissed. (See Defendants' Exhibits 272, 273).

The assertion is made that "it cannot be important *why* the public has given these nicknames ["coke," "dope," "shot," etc.,] to 'Coca-Cola;' the fact is that the public has done so, and defendants are knowingly and unfairly taking advantage of this fact." (Supplemental brief, p. 36). This is just another attempted evasion. The one vital, controlling question in this case is *why*, and *for what purpose*, the public use these expressions, if they use them to designate *origin* or *manufacture*, and to point out *plaintiff's* manufacture specifically, plaintiff wins; if they do not, but, instead, use them, as they actually do, simply to indicate the *kind* of drink they want, by referring to the ingredients or effects peculiar to that kind of beverage, plaintiff loses. The Commissioner of Patents held, in the case which plaintiff asserts is now *res adjudicata*, that defendants were not entitled to register the word "Koke" as a trade-mark,—not because it was a distinctive designation of origin applied exclusively to plaintiff's manufacture,—but because it was a "popular pseudonym" for the class of goods which defendants sell. (See, also, *Coca-Cola Co. v. Branham*, *supra*.)

Plaintiff asserts with a reckless indifference to fact that "there is neither a statute nor any principle of the common law which would make misbranding or adulter-

ation, or even a clear, conclusive, and final adjudication between the United States and the Coca-Cola Co. of technical misbranding, an obstacle to the protection of established trade and property rights in the word 'Coca-Cola.' ” (Supplemental brief, p. 20).

The common law of both England and the United States has for more than a hundred years made the use by a plaintiff of deceptive and misleading trade-marks or trade-names a complete bar to any protection whatever for a business which has grown out of, and is being carried on by means of, such fraud and deceit (See Appellants' brief, pp. 51 et seq.); and Section 21 of the Trade-Mark Act of 1905 expressly provides:

“That no action or suit shall be commenced under the provisions of this Act in any case where the trade-mark is used in unlawful business, or upon an article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise,” etc.

It is not true that the decree entered in the case of the *United States v. Forty Barrels, etc., of Coca-Cola*, 241 U. S., 265, provided that it should not be *adversely employed* in any other litigation in which the Coca-Cola Co. was interested. It simply provided that “the *judgment of forfeiture* shall not be *binding* upon the claimant or its product as it shall relate to any other case or proceeding.” The decree did not purport to relieve plaintiff from any inference of guilt which might be drawn from the fact that it *changed its formula*,—or, as the decree

expressed it, "made certain modifications in its process of manufacture,"—in order to escape the humiliation of the judgment of guilt which would undoubtedly have been entered if the case had again been brought to trial, and to escape other prosecutions for misbranding and adulteration which would certainly have followed if plaintiff had not changed its formula.

Plaintiff insinuates that the interlocutory, *pro forma*, decree entered by Judge Foster in the case of *Coca-Cola Co. v. Southern Koke Co. Ltd., et al.*, in the District Court at New Orleans, was an independent adjudication upon the facts, and that that decree is now a final decree and that the questions therein adjudicated are now *res adjudicata*. Nothing could be further from the truth. Judge Foster filed no written opinion, but he stated orally from the bench that, although the case had been elaborately presented, he was of the opinion that all questions therein should be treated,—for the time being, at least,—as *res adjudicata*, in view of Judge Sawtelle's decree in the case at bar, and that he had therefore concluded to enter the same decree as Judge Sawtelle had entered, awarding a reference so the decree would remain interlocutory and under his control until this court had had a reasonable time to act upon this appeal. The assertion that the time for appealing from this interlocutory decree has elapsed displays a shocking misconception of the law governing appeals.

In *Nashville Syrup Co. v. Coca-Cola Co.*, 215 Federal, 534 (C. C. A.-6), it was said:



“The interlocutory decree awarding an injunction and making a reference to take an account of damages was entered July 29th, 1912. The master’s report was filed October 8th; defendant excepted, and the final order of the court on the exceptions was dated November 25th. This order made no reference in terms to the order of July 29th, and was, in terms, confined to the sustaining of one exception, the overruling of another, an adjudication that plaintiff had failed to establish any damages, and a disposition of the costs. \* \* \* Clearly the decree of July 29th did not become final until November 25th. This last order might well have repeated, in terms or by reference, the provisions of the order of July 29th, so that there would have been one complete, final decree, and we think this would have been according to the most careful practice; but the order of November 25th necessarily has this effect, and operates to redeclare the adjudications which, up to that time, had been interlocutory and within the control of the court, and which then, for the first time, became final. The defendant then had six months within which to appeal from any part of this consolidated final decree. Loveland’s Appellate Jurisdiction, 467, 468; *Grant Co. v. Laird Co.*, 212 U. S., 445, 29 Dup. Ct., 332, 53 L. Ed., 591.”

## SCHEDULE I.

### Defendant's Chain of Title to "Koke."

On Sunday, October 2nd, 1887, Dr. J. S. Pemberton, of Atlanta, Ga., who was then operating the Pemberton Chemical Co., at 107 Marietta St., Atlanta, and manufacturing "Pemberton's French Wine Coca," "Globe Flower Cough Syrup," "Indian Queen Hair Dye," "Coca-Cola Syrup," "Gingerine," "Compound Extract of Styllingia," and other preparations, placed an advertisement in the Atlanta "Constitution" reading as follows: (Rec., 1278)

"Wanted: An acceptable party with \$2,000 to purchase a one-half interest in a very profitable and well-established manufacturing business. Absolutely no risk. Guaranteed a 50 per cent. profit on investment, with possibilities of much larger profits. A rare opportunity to right party. A full investigation solicited. For particulars, address, with your name, 'Busines,' 8½ Marietta Street, Atlanta."

A photograph of page 13 of the Atlanta "Constitution" of Sunday, Oct. 2nd, 1887, showing this advertisement, and duly authenticated by the custodian of the Congressional Library at Washington, is in evidence as *Defendant's Exhibit 13*.

A. O. MURPHY, of Barnesville, Ga. (Rec., 1277-8):

"I knew of J. S. Pemberton, of Atlanta, Ga. I first met him in 1887. My first introduction to him



was through an advertisement that he had in the Atlanta 'Constitution' in something like, I think, October, 1887. \* \* \* When I saw that advertisement I wrote to that address there,—got in correspondence with him. I suppose we passed something like a half dozen letters."

*Defendants' Exhibits 14 to 20*, inclusive, are the original letters written by Dr. Pemberton to A. O. Murphy. The first one, dated October 4th, 1887 (*Exhibit 14*), begins as follows:

"Atlanta, Ga., Oct. 4th, 1887.

"A. O. Murphy, Esq.,  
"Barnesville, Ga.

"Dear Sir:—

"In reply to yours of the 3rd. inst. addressed to 'Business' in answer to card which I had insterted in last Sunday's Constitution, beg to inform you that the business which I desire some energetic & good party to join me and take an interest is that of manufacturing a line of medicines which I began to make & introduce about 3 years ago," etc.

A. O. MURPHY (Rec., 1279):

"When I first came to Atlanta I found Dr. Pemberton doing business down on Marietta St., I have forgotten the number. He had an office in front, a laboratory in the back, and in the basement he was making 'Wine of Coca,' 'Coca-Cola,' a cough syrup of some description, and I think perhaps a hair dye,

and a preparation of some kind made from ginger, called 'Gingerine,' something like that, I think that was the list. \* \* \* There was nobody with Dr. Pemberton at that time, associated with him in business, that I knew of. He was making these preparations in a small way only when we came there. 'The first time I ever visited him he carried me back in his manufactory where he manufactured a bit in a small way. (Rec., 1279-80). \* \* \* In December, 1887, I finally moved to Atlanta, and, with Mr. Mayfield and Mr. Bloodworth, who was another townsman of mine, formed a partnership with Dr. Pemberton under the name of Pemberton Medicine Co. (Rec., 1279). \* \* \* My first correspondence was between Dr. Pemberton and myself. Afterwards I drew into it my friend, Mr. Bloodworth,—E. H. Bloodworth,—who was of our town, and, also, a partner at that time, and, after we arrived in Atlanta, before we consummated the trade, we met Mr. Mayfield,—J. C. Mayfield,—from Alabama, who had also been in correspondence with him in reply to that advertisement in the 'Constitution,' so, after a conference between Mayfield, Bloodworth and myself, he came into the deal and we formed the partnership. All four,—Pemberton, Bloodworth, Mayfield and myself,—had equal partnership. We each of us three were to pay \$2,000 cash into the concern, and Pemberton was to have an equal interest and put up his laboratory, office fixtures, and formulas, business, good-will, and one thing and another, as an off-set for the \$2,000 each one of us put up. 'The formula for 'Coca-Cola' was included in that transaction. I drew up the partnership contract,—what you might call a business agreement,—stating the terms of the partnership. \* \* \* It occurs to me I drew it up under the direction of Judge Simmons, my father-in-law,—Judge

T. J. Simmons,—he was living with me at the time."

J. C. MAYFIELD (Rec., 1586 and 1604):

"In 1887 an uncle of mine had formerly been in business, and we sold out in Rock Mills, Ala., and we had a little money,—his name was Randall. Mr. Randall noticed an advertisement in the Sunday's 'Constitution' where the ad. wanted a partner to join in a manufacturing business (1586). \* \* \* *Defendants' Exhibit 13*, being a photograph of a page of the Atlanta 'Constitution' of Oct. 2nd, 1887, is the advertisement I spoke of. (Rec., 1604). \* \* \* He called my attention to it, and I told him to answer the advertisement, and we got a reply from Dr. Pemberton. Well, we were both favorably impressed with Dr. Pemberton's letter, \* \* \* and, of course, a few letters passed, and we both went to Atlanta and had a conference with Dr. Pemberton (Rec., 1586) \* \* \*. When we went to Atlanta we went to Dr. Pemberton's place of business to see him. His place of business then was 107 Marietta St., that is my recollection. He was doing business under the name of Pemberton Chemical Co.,—it was a two-story brick residence (Rec., 1605). \* \* \* He showed us what he had, went over the whole business, made us his proposition (Rec., 1586). \* \* \* He had an office in the front room, the back hall had his manufactured goods in it, all the first floor was used for the laboratory, his basement was also used, and Dr. Pemberton lived in the second story. He was then making 'Wine of Coca,' 'Coca-Cola,' 'Globe Flower Cough Syrup,' 'Indian Queen Hair Dye,' 'Triplex Pills,' he made a liniment,—'Mustang Liniment,'—his blood medicine, 'Pemberton's Styl-

lingia,' 'Pemberton's Compound Extract of Stillingia,' I believe that he had a preparation that he called lime juice and ginger. That is about all I can remember now. During my visit there in 1887 I saw Dr. Pemberton actually making 'Coca-Cola' syrup (Rec., 1606). \* \* \* We went back home and had the matter under discussion, and my uncle decided that he would not go in with it \* \* \* but a few days thereafter I got a letter from the doctor that there was some other men figuring with him that would put in some money,—Mr. A. O. Murphy and Mr. Bloodworth. We three met in Pemberton's place of business in Atlanta and went over his business very thoroughly, and we agreed to go in with him (Rec., 1587). \* \* \* I was to put in \$2,000, Mr. Bloodworth \$2,000, Mr. Murphy \$2,000, and Mr. Pemberton was to put in all his business, stock of goods he had on hand, good-will, formulas, trade-marks, and everything of every nature and character pertaining to his business, for another fourth interest valued at \$2,000. There was no agreement drawn up at that time, but it was agreed, and I moved my family to Atlanta sometime shortly thereafter in December. Mr. Murphy, or Mr. Bloodworth, was a little bit delayed getting up their money, and it was sometime in January, 1888, that the articles of agreement were drawn up and signed by us all (Rec., 1587). \* \* \* A written contract of partnership was drawn up between us (Rec., 1607). \* \* \* It recited all the facts. We three were to put in \$2,000 cash,—Murphy, Bloodworth, and Mayfield,—and Pemberton was to assign to us his assets, good-will, trade-mark, formula, stock on hand, and everything he had pertaining to that business he had, for one-fourth interest. \* \* \* The right to sell and manufacture 'Coca-Cola' was included in that contract (Rec., 1607). \* \* \* I act-

ually paid \$2,000 into the partnership, Mr. Bloodworth paid in \$2,000, it strikes me Mr. Murphy paid -1,500 and gave his obligation for \$500." (Rec., 1608).

A. O. MURPHY (Rec., 1287) :

"This (*Defendants' Exhibit 22*) is a paper covering the dissolution of the partnership, \* \* \* an agreement between the four partners consenting to my retiring and their assuming all the obligations and everything in the business in the caption of that contract the date is mentioned there when the partnership was formed. I suppose this is the exact date the partnership was entered into, or it would not have been specified in the agreement. It shows there as January 14th, 1888. \* \* \* That is the original paper, written by my brother, who is a lawyer (Rec., 1287). \* \* \* I left the contract [the original partnership agreement of January 14th, 1888] with Mr. Mayfield and Mr. Bloodworth when I sold out. I had charge of the office up to that time,—I kept it in my possession,—but of course all of the office papers were then turned over to them." (Rec., 1281).

J. C. MAYFIELD (Rec., 1607) :

"I have not a copy of that contract now, nor the original. Mr. Murphy was the office man, Mr. Bloodworth was the road man, and I was the laboratory man. These papers were turned over to the office man, and after Mr. Murphy left us, Mr. Bloodworth was the office man, and he took charge of all papers of the company. I never had them in

my possession, except as being connected with the firm."

MRS. FRANCES B. THOMPkins (Rec., 1272):

"I am 29 years old. I live in Waynesboro, Ga. My father is T. C. Banks. Mrs. Shelverton \* \* \* is my aunt. I was present after the death of Mrs. Shelverton's father when she was looking over some of his papers. She and I were living in the same house. It was just about three and a half to four years ago. Mr. E. H. Bloodworth was my grandfather, and my mother was the oldest child. He lived at her home more than anywhere else, and I was living at home at this time. It was after my mother's death and grandfather's death,—I am a widow and live with Mrs. Shelverton. We were there cleaning out my grandfather's trunk, and we were going through to see if there was any of grandfather's papers we wanted, and so she picked up this paper, contract, some sort of legal agreement,—I could not tell you exactly what it was. She read it to me and my brother sitting there beside her. She said, 'Here is this old contract between my father and Mr. Pemberton,' and in this contract were enumerated numerous articles that were to be manufactured, and among them was 'Coca-Cola,' and she read out the word 'Coca-Cola,' and she said to me, 'Isn't that awful to think that my father did not keep that.' She said, 'Think what we would have had today if he had not sold his formula to them, but had kept on manufacturing 'Coca-Cola,' and she said, 'Isn't it a shame that my father sold that, and that we are not making Coca-Cola today.' I remember the names that were signed to that contract, because she read them over



to me and said, 'Look at this; it looks almost like lithographing.' My grandfather's name was there, and I think it was signed by Mr. Murphy, my grandfather, Mr. Bloodworth, and Mr. Mayfield. I have no idea of the date of the contract. After she read it, it was tossed and thrown into the fire with some other books and papers that we had. We had no use for it, and were getting rid of all his rubbish." (Rec., 1272-4).

MRS. N. L. SHELVERTON (Rec., 1269-1272):

"My father is E. H. Bloodworth. \* \* \* I did have papers belonging to my father. I was the oldest living girl, and when my father died he just told me that his papers were in his trunk and that I should go over them and keep what I chose and destroy what I chose. Soon after my father's death we moved away from Atlanta, and I destroyed all that I thought I wanted to destroy. We have been away from Atlanta four years, and papa died four and a half years ago (Rec., 1269). \* \* \* I did not destroy any papers without reading them. The paper that made the most impression upon me,—that I hesitated to destroy, but finally did destroy, I am sorry,—was this contract, and with this contract I also destroyed some cotton papers that have proved a loss to me since. He was a cotton man. 'This business contract,—you know, a woman is not much of a business person, I suppose you would call it an agreement,—it was some kind of a legal contract, you know, regarding, I believe, my father and these other gentlemen,—Mr. Mayfield, Mr. Murphy, Mr. Pemberton and my father \* \* \* who put up their money against the doctor's medicines,—against Dr. Pemberton's medicines, I mean. \* \* \* I remember

some of the names of some medicines in that contract (Rec., 1270). \* \* \* It had 'Wine of Coca' and 'Coca-Cola' in it, and, of course, that is the name that impressed me the most because it was then so much before the public. I do not remember the date of the contract (Rec., 1271). \* \* \* The parties to that agreement were Dr. Pemberton, Mr. Mayfield, Mr. Murphy and my father. The medicines described were 'Indian Queen Hair Dye,' 'Globe Cough Syrup,' 'Lemon & Orange Elixir,' and 'Wine of Coca' and 'Coca-Cola' (Rec., 1272). \* \* \* There were several of us, we were reading, and I did the reading. \* \* \* Some of those that were present when I read them were my nephew and my niece. My niece's name was Mrs. Frances B. Thompkins, and Charles E. Banks was the nephew, and we were sitting there, and I was destroying and reading them aloud." (Rec., 1271)

THOMAS C. BANKS, of Newman, Ga. (Rec., 1408-1413):

"Before I came here I lived in Atlanta. Engaged in the railway mail service,—been in that business 29 years. I have lived in Atlanta for 25 years,—twenty-five,—twenty-six years. I knew E. H. Bloodworth. He was my father-in-law. I went to Atlanta before he did. He came there, I think, in '87, perhaps, or '88. He went to live with me,—he lived and occupied the same house at 8 Woodard Ave. We lived practically together most of the time. He came here to go into business with Mr. Mayfield,—Mayfield and Pemberton,—in the medicine business. He came there,—it must have been in mid-winter,—December or January, I do not recall the day or date. He went in business with



them. They were making 'Coca-Cola,' 'Stillingia,' a blood medicine, and 'Lemon & Orange Elixir,' 'Mustang Liniment,' 'Queen Hair Dye,' and 'Globe Flower Cough Syrup,'—I recall those,—well, perhaps something else I have forgotten about (Rec., 1408-9). \* \* \* I cannot say I ever saw the contract of partnership. I heard them discuss it and all, but so far as reading the contract I cannot say I ever read it. \* \* \* They came in possession of all those formulas for all those different drinks and proprietary medicines,—in possession of all of them." (Rec., 1412-13).

MISS MARION BLOODWORTH (Rec., 1262):

"My father was E. H. Bloodworth. \* \* \* He came here to go in business with Mr. Pemberton, Mr. Mayfield and A. O. Murphy. I was living here with my sister when he came. He went in business with these parties. It was a medicine business, called the Pemberton Medicine Co. They came just before Christmas. It was in 1887 that they came here. \* \* \* They made 'Globe Flower Cough Syrup,' 'Coca-Cola,' 'Lemon & Orange Elixir,' and 'Wine of Coca,' and some kind of hair dye, I do not remember that,—'Indian Queen Hair Dye,' that was it." (Rec., 1262).

Plaintiff read into the cross-examination of Miss Marion Bloodworth an alleged affidavit purporting to have been made by E. H. Bloodworth in Atlanta on August 9th, 1905, in which the following statements were made (Rec., 1265-6):

"In 1888 A. O. Murphy, of Barnesville, Ga., Mrs.

*Diva Brown*, and myself bought Dr. Pemberton's formulas, including 'Coca-Cola (1262). \* \* \* Dr. Pemberton died soon after and we lost the 'Coca-Cola' name. We used the formula and called out goods 'Yum-Yum,' but failed to successfully introduce it." (1266).

In so far as this alleged affidavit states that Dr. Pemberton sold all his formulas, including "Coca-Cola," to the Pemberton Medicine Co., it of course speaks the truth, but the substitution of *Mrs. Diva Brown* for *J. C. Mayfield* as one of the partners in the Pemberton Medicine Co. is a piece of fiction. The original dissolution agreement, in evidence as *Defendants' Exhibit 22*, conclusively proves that Mrs. Diva Brown was not one of the partners, not to mention the testimony of A. O. Murphy, J. C. Mayfield, T. C. Banks, Miss Marion Bloodworth, Mrs. N. L. Shelverton, Mrs. Frances B. Thompson, Asa G. Candler (Rec., 383) and F. M. Robinson (Rec., 360). That Mrs. Diva Brown had no interest in the business, but that J. S. Pemberton, A. O. Murphy, E. H. Bloodworth, and J. C. Mayfield were the only parties having an interest in the Pemberton Medicine Co. is also shown by the letter-head of the Pemberton Medicine Co., on which the names of the four partners appear, a photograph of which, duly authenticated by the Commissioner of Patents, is in evidence as *Defendants' Exhibit 21* (Rec., 1285), and a reproduction of which will be found opposite page 130 of Appellants' Brief. The fact is also shown by the certified copy of an application for a charter by which it was proposed to incorporate the Pemberton Medicine Co., which

document is in evidence as *Defendants' Exhibit 62* (Rec., 1616), and which recites the fact that Pemberton, Murphy, Bloodworth and Mayfield, doing business as the Pemberton Medicine Co., desired to be incorporated under that name.

This Mrs. Diva Brown was Mayfield's wife in 1887 and '88, and up until about 1898, when she secured a divorce and married a Judge Brown (Rec., 2419-20).

A. O. MURPHY (Rec., 1290):

"I suppose I had met Mr. Mayfield's wife. They lived in a different part of town from us, and perhaps I had been introduced to her by Mr. Mayfield. I just knew her as his wife. She had no interest in the business at that time, or during the time I was associated with it, whatever,—nothing to do with it."

Plaintiff read into the cross-examination of John D. Fletcher (Rec., 1096) an alleged affidavit purporting to have been made by Mrs. Diva Brown, who died before this suit was brought. In this alleged affidavit Mrs. Diva Brown is represented as swearing, among other things, as follows:

"About 14 years ago I was one of the members of the J. S. Pemberton Med. Co., of Atlanta, Ga. The firm consisted of Dr. J. S. Pemberton, of Atlanta, Ga., Mr. Murphy, of Barnesville, Ga., (a brother-in-law of Judge Simmons, of the Superior Court of Georgia), Mr. Bloodworth, of Barnesville, Ga., Mr. Mayfield, of Atlanta, *and myself*. Dr.

Pemberton put in the formulas of 'Coca-Cola,' 'Pemberton's French Wine Coca,' 'Indian Queen Hair Dye,' 'Lemon & Orange Elixir,' 'Globe Flower Cough Syrup,' etc., into the firm, and each of the other members of the firm put in a certain sum of money. Mr. Murphy did the advertising, Mr. Bloodworth the book-keeping, Mr. Mayfield *and myself* the manufacturing. Dr. Pemberton, who was in very poor health, superintended the manufacturing when well enough."

Mrs. Diva Brown stated the facts correctly in this extract, except for the addition of herself as a member of the firm and as having herself participated in the manufacturing. As will be shown later on, after her divorce from Mr. Mayfield, she made her living by selling some sort of formula for a cola drink which she represented to be the original "Coca-Cola" formula, and she made this affidavit, and got E. H. Bloodworth to make the affidavit above referred to, containing the statement that she was a member of the old Pemberton Medicine Co., and assisted in the manufacture of "Coca-Cola" herself, in order to lend color to her representations that the formula she was selling was the original "Coca-Cola" formula.

On August 1st, 1899, Mrs. J. S. Pemberton, widow of old Dr. Pemberton, made an affidavit before Fred W. Burress, a notary public of Atlanta, Ga., which was also witnessed by C. H. Crimm, in which she swore (Rec., 1618):

"That my husband, Dr. J. S. Pemberton, was the

originator of the formula for making 'Coca-Cola,' 'Wine Coca,' and other similar fountain beverages; that Mr. J. C. Mayfield, of Atlanta, was associated with Dr. J. S. Pemberton long before and up to the time of his death, and it was under my husband's own personal supervision and instruction that Mr. Mayfield was taught to manufacture these and other specialties. To my personal knowledge Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca Companies were formed. \* \* \* It is undoubtedly true that he is today the oldest and most efficient and experienced living man in the manufacture of those specialties, and the most reliable expert on the subject."

A printed copy of this affidavit is in evidence as *Defendants' Exhibit 66* (Rec., 1618), the original having been lost by one of the printers to whom it was sent as "copy." (Rec., 1619).

J. C. MAYFIELD (Rec., 1618):

"Mrs. Pemberton, on Aug. 1st, 1899, in Atlanta, Ga., did sign this certificate (*Defendants' Exhibit 66*), which reads as follows: \* \* \* I was in Atlanta on August 1st, 1899, when Mrs. Pemberton signed it (Rec., 1618). \* \* \* Mrs. Pemberton turned the original certificate over to me after she signed it. It must have gotten lost at some of the printers,—I had some of these things printed. I did keep it for quite a while, carrying it from place to place." (Rec., 1619).

C. H. CRIMM, Tennessee Manager of the Germania Life Insurance Co. of New York (Rec., 1038):

"I know Mrs. J. S. Pemberton, the wife of J. S. Pemberton, just slightly. I witnessed a certificate signed by her (Rec., 1038). \* \* \* Mrs. J. S. Pemberton signed the certificate about 1889 [1899] in Atlanta, Ga., in the old Norcross Building. \* \* \* It was along the line that they were associated in business. Mr. Mayfield was associated in business with her husband when they manufactured a beverage there several years ago,—along that line (Rec., 1039). \* \* \* Q.—Do you remember the name of the beverage that she stated in that certificate that her husband and J. C. Mayfield had been manufacturing? A.—'Coca-Cola.' I don't know what became of the original certificate. I do not know what became of the gentleman who signed there as notary public, Mr. Fred W. Burress. He was a young lawyer there in Atlanta. I do not know [what] became of Mrs. J. S. Pemberton." (Rec., 1040).

Mrs. Pemberton died several years before this suit was brought.

J. C. MAYFIELD (Rec., 1588, 1608-9):

"Before the articles of agreement were signed, I was around his place of business all the time and was getting as well posted as I could, because it was agreed that I was to do the manufacturing (Rec., 1588). \* \* \* Q.—Now, was the formula for making 'Coca-Cola' made known by Dr. Pemberton to the members of that partnership at that time? A.—It was to me. \* \* \* He got his formula book and



called it over to me word for word before we left the Marietta St. place. \* \* \* He was in bed sick, and we thought we ought to have it, you know,—we were looking after things, and we had paid in our money. \* \* \* He sent for me, and I went up to his sick bed, and he had the formula book, and I brought me a book, and I copied everything, word for word, as he gave it out, with complete instructions. \* \* \* Q.—Was the formula for ‘Coca-Cola’ copied by you at that time? A.—It was (Rec., 1608). \* \* \* After the formation of this partnership, the partnership took the name of Pemberton Medicine Co. Under that name we manufactured ‘Wine of Coca,’ \* \* \* ‘Globe Flower Cough Syrup,’ the blood medicine, ‘Lime Juice and Ginger,’ ‘Coca-Cola,’ ‘Indian Queen Hair Dye,’ \* \* \* ‘Lemon & Orange Elixir.’ \* \* \* After the formation of the partnership I made the ‘Coca-Cola’ syrup. When I made my first batch of ‘Coca-Cola’ syrup, Dr. Pemberton was there telling me,—I had to do all things,—and he would stand around and tell me how to do those things.” (Rec., 1609).

A. O. MURPHY (Rec., 1285):

“Dr. Pemberton and Mr. Mayfield had charge of the laboratories. Of course, I was in there off and on and aided myself in making it with them, but they were recognized as the head of the laboratory department. Mr. Bloodworth was on the road. Mr. Mayfield knew the formula for making the product,—that was done when Dr. Pemberton was at home. Mr. Mayfield was the practical man in the laboratory. Dr. Pemberton was simply directing him.”

T. C. BANKS (Rec., 1412):

"Mr. Mayfield, I think it was, that actually mixed the syrup, this 'Coca-Cola.' \* \* \* He learned from old Dr. Pemberton, I suppose,—he was there to instruct him."

J. C. MAYFIELD (Rec., 1588):

"We did some manufacturing at his old place on Marietta St. \* \* \* It seems to me like it was 107 Marietta,—somewhere along there,—it was below the post office. We did not like the place, and we looked for a new place on South Pryor St.,—I think it was the corner of Pryor and Hunter,—and we moved down there, maybe it was the last of January. \* \* \* We had the office on the first floor, and the laboratory and all this other stuff on the second floor,—up stairs (Rec., 1588). \* \* \* When we left 107 Marietta St., and went down to South Pryor St. \* \* \* we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months. After we began to manufacture this Coca-Cola syrup, we sold it. The trade was small. I do not suppose we ever shipped any in the beginning over 5 gallons,—some gallon jugs, and the 5-gallon kegs was the most sizes that we put it in then. We might have shipped some quart bottles, or something like that, to good people,—considered that was more a gift than anything else, a sample. \* \* \* We put labels on these containers to indicate the contents of them; it had a label, 'Coca-Cola.' " (Rec., 1610-11).

A. O. MURPHY (Rec., 1281):



"After we formed this partnership, we continued to manufacture down on Marietta St. a very short time, and then we moved up on Pryor St.,—Pryor or Hunter,—and continued the manufacture there, right in the second story. My office was at first on the lower floor, and afterwards we moved the whole thing up-stairs (Rec., 1281). \* \* \* We sold the entire line. \* \* \* The 'Wine of Coca,'—it was a wine tonic put up in quart bottles,—and 'Coca-Cola,' the fountain syrup, and the 'Gingerine' were the three we pressed more than any others. \* \* \* We manufactured and sold this product 'Coca-Cola' under that name." (Rec., 1282).

MISS MARION BLOODWORTH (Rec., 1264-1262):

"Immediately after this partnership was formed, they made and sold a product under the name of 'Coca-Cola.' I distinctly remember labels of 'Coca-Cola.' \* \* \* The labels were pasted on kegs in one form or another,—I just remember seeing it on top of the kegs (Rec., 1264). \* \* \* I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now, and it looked like 'Coca-Cola.' They had little kegs, I would call them, for shipping it out. They were painted red. They had 'Coca-Cola' on them." (Rec., 1263).

THOMAS C. BANKS (Rec., 1409):

"They were making 'Coca-Cola,' \* \* \* 'Stillin-gia,' a blood medicine, and 'Lemon & Orange Elixir,' 'Mustang Liniment,' 'Queen Hair Dye,' and 'Globe

Flower Cough Syrup.' I recall those,—well, perhaps something else I have forgotten about. \* \* \* This product 'Coca-Cola' was a drink \* \* \* a soda fountain drink. \* \* \* Color of it was a dark mahogany. \* \* \* It tasted like the 'Coca-Cola' you get now,—practically the same taste. I had occasion to go down to the places of business of these people frequently. \* \* \* I often went down to the place of business during the time they were making that ['Coca-Cola.']. They were selling it,—shipping it around and selling it to soda fountains. They put it in small kegs and jugs that I saw. The kegs were painted red. The kegs were marked 'Coca-Cola,' in comparatively large letters (Rec., 1409). \* \* \* I saw them making 'Coca-Cola' myself. I saw the labels, 'Coca-Cola.' " (Rec., 1413).

A. O. MURPHY (Rec., 1282-4):

"Something like a couple of months, or perhaps it might have been more than that, or three months after that, this controversy with the old doctor in regard to 'Coca-Cola,' in connection with his son Charlie, came up (Rec., 1282). \* \* \* He sprung the question on us that he had sold the right to make 'Coca-Cola' to his son Charlie. Really, the way he expressed it, Charlie had, on certain occasions, obtained a written sale, a bill of sale, of this 'Coca-Cola' drink' and he would have to conform to it, but he would get us up a substitute which would be identically the same thing under a different name. Then arose the controversy in regard to that part of the business. This substitute he mentioned was not a different product from the one that we had theretofore been manufacturing, except in name. \* \* \* We had a discussion about trying to keep the name

'Coca-Cola.' One would naturally suppose we had quite a row over it among the partners, but the whole gist of the thing is this: After we had gotten our hands into the fire and consummated the trade and got to work, and, as I stated a while ago, we found out to our sorrow that Dr. Pemberton was a drug fiend, and that of course was distasteful to any man of business, and the crowning act was when he violated his contract in regard to this 'Coca-Cola' syrup, and we, of course, had quite a warm time of it for a while, and he had to pacify us with the idea that we put out identically the same thing under a different name (Rec., 1283-4). \* \* \* Most anybody acquainted with the history of these drinks knows that about that time 'Coca-Cola,' 'Wine of Coca,' or none of these drinks were very prominent. They were all in their infancy,—in fact, that drink idea, soda fountain drink idea, was in its infancy,—and rather than break up the whole thing and create a row among partners, we tacitly and silently went to work to see if we could off-set it in some other way (Res., 1284). \* \* \* We first started out with the name called 'Yum-Yum,' and then we got on to one or two others,—'Koke' (Rec., 1283). \* \* \* We held to 'Koke' after we used 'Yum-Yum' a while, and abandoned that and then agreed on 'Koke.' \* \* \* 'Koke' was adopted for the product in the spring of '88. \* \* \* The product was all labeled, whether it went out in the shape of kegs or barrels. We did not use much barrel stuff, of course, then; we were too little. Sometimes it went out even in smaller quantities than that, and, when put out, it was, of course, labeled just like 'Wine of Coca' was labeled,—labeled with this word 'Koke.' Those barrels and kegs, to my recollection, were painted just common red." (Rec., 1284).

J. C. MAYFIELD (Rec., 1588-9, 1612-13):

"Dr. Pemberton was in bad health. We did not know at the time what was the matter with him, but it developed later that he was a drug-fiend. Of course, we were all very much put out by the fact (Rec., 1588). \* \* \* After we had manufactured and sold 'Coca-Cola' for two or three months, Dr. Pemberton stated to us one day that he had decided to give 'Coca-Cola' to his son. \* \* \* I knew he had been having trouble with his son, who was an unruly bad boy, and he reported to us that he would have to give it to him to keep peace in the family (Rec., 1612). \* \* \* Dr. Pemberton had a son, an only child, Charley Pemberton, who knew all about manufacturing these specialties. \* \* \* He discussed it with me, that he would do the manufacturing, but it was agreed and understood that I would do the manufacturing. Naturally, it cut the son out of a position. He was disgruntled,—dissatisfied,—and made it up for the old man, Dr. Pemberton. \* \* \* He said he would have to give him that business in order to keep peace (Rec., 1588-9) \* \* \* but we did not agree,—this was after I bought a fourth interest in 'Coca-Cola,' after we had been manufacturing and selling and going around satisfied with the business. The old doctor was sick, and kept fretting around about it, and said it was not of much value, that "it had [not] been on the market very long"; that "we had the same formula and could go on and make the same goods under some other name and he would appreciate it. \* \* \* 'The other partners and I did not agree to any sale or assignment of the business of manufacturing and selling 'Coca-Cola.' \* \* \* We went ahead and sorter accepted the situation in a way. \* \* \* We tried to

have peace in the family if we could, and we discussed among ourselves what to call our 'Coca-Cola,' and agreed upon the name 'Koke' (Rec., 1612-13). \* \* \* We used a label to designate the goods, of course, and placed on the label 'Koke,' spelled 'K-o-k-e.' The product was not different from the product 'Coca-Cola,' there was no difference between the product which we thereafter labeled 'Koke,' and 'Coca-Cola.' We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula. After we had changed the name of this product from 'Coca-Cola' to 'Koke,' [when] we received orders from our old customers for 'Coca-Cola,' we shipped them 'Koke,' and wrote them a nice letter and explained the situation and conditions, which were always satisfactory; I never heard any complaints." (Rec., 1613-14).

MISS MARION BLOODWORTH (Rec., 1263):

"They made this 'Coca-Cola' three or four months; then they still made it and called it 'Koke.' "

THOMAS C. BANKS (Rec., 1410):

"If there was any difference between this preparation they called 'Koke,' and the preparation called 'Coca-Cola,' I could not tell it from drinking it and looking at it. It appeared to be the same thing. It was supposed to be practically the same thing, I think, under different name (Rec., 1410). \* \* \* I first saw the change from 'Coca-Cola' to 'Koke' during the summer sometime, or spring-time. I cannot recall the exact time, but [it was] after they had been in business for some time. My father-in-

law (E. H. Bloodworth) told me about this trouble with Dr. Pemberton. (Rec., 1414-15).

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 382):

"The Pemberton Medicine Co.'s business was manufacturing 'Wine Coca,' and they undertook to manufacture,—it was a hair dye, and they had 'Globe Flower Cough Syrup,' and 'Compound Stillugia,' and shortly after I bought 'Coca-Cola,' they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company,—he called it 'Yum-Yum.' \* \* \* I am not certain whether that was manufactured by the Pemberton Medicine Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. \* \* \* I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that's right, they were connected with the Pemberton Medicine Co. \* \* \* These people,—Mayfield, Bloodworth and Murphy,—were running the Pemberton Medicine Co.,—I don't think they ran it long,—and they were manufacturing a drink similar to 'Coca-Cola' at that time (Rec., 383). \* \* \* You ask whether *April 14th, 1888* \* \* \* *was the first time I ever owned any interest in 'Coca-Cola';* \* \* \* *I believe it was, I can't say positively,—it looks like it,—that's the record.*" (Rec., 382).

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358), and for 22 years its secretary



(Rec., 353), says, "I don't know that that is my business to be giving you," (Rec., 359), but (Rec., 359):

"Dr. Pemberton and some other gentlemen formed the Pemberton Medicine Co. \* \* \* I think they operated on South Pryor Street. They did a medicine and extract business,—they manufactured those articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks,—cola's,—to some extent (Rec., 359). \* \* \* XQ.—You knew they were manufacturing drinks and putting them on the market? A.—I heard they were manufacturing drinks, yes. XQ.—That was part of the history of the community, that they were doing that? A.—Yes, sir. As to the associates which Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them, and a Mr. Bloodworth was another one,—I don't remember his name now,—Murphy, I guess it was (Rec., 360). \* \* \* The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. Yes, I observed that just like I did Hagan & Dodd's,—what comes out. \* \* \* I don't know anything about the quantities they manufactured or sold, but I know [that they made and sold a cola drink] just as well as I know that Hagan & Dodd manufacture 'Ko-Nut,' but I don't know anything about the extent of it" (Rec., 364-5). \* \* \* The other products that were gotten out by the Pemberton Chemical Co., aside from 'Coca-Cola,' were 'Pemberton's French Wine Coca,' 'Globe Flower Cough Syrup,' 'Indian Queen Hair Dye,' and a preparation called 'Gingerine.' So far as I know, it went from the Pemberton

Chemical Co. to the Pemberton Medicine Co. (Rec., 362).

J. C. MAYFIELD (Rec., 1614):

"After we had adopted and applied this name 'Koke' to our product, the partnership as then organized continued up to about, I believe, some time in June, [when] Mr. Murphy withdraw [*Defendants'*] *Exhibit 22* is an agreement whereby we agreed to let Mr. Murphy withdraw from the partnership. We all signed that. That is my signature, those are the signatures of the other parties. I recognize them as the genuine signatures. *Exhibit 22* correctly sets forth the agreement we entered into at that time. After the retirement of Mr. Murphy, we continued the business as a partnership, us three, instead of four,—Mr. Murphy had withdrawn,—Mayfield, Bloodworth and Pemberton. We continued to manufacture and sell 'Koke' (Rec., 1614). \* \* \* A short time thereafter Dr. Pemberton died. \* \* \* We had to make a settlement, of course, with the Pemberton estate,—Mrs. Pemberton and her son (Rec., 1590-1). \* \* \* Mr. Bloodworth and I had a conference with Mrs. Pemberton. \* \* \* We did not care to go on with the partnership, and we wanted to divide up (Rec., 1615). \* \* \* Mrs. Pemberton took the formula and business of the 'Indian Queen Hair Dye,' and we had quite a lot of manufactured goods, and we gave her one-third of the manufactured products (Rec., 1591). \* \* \* Mrs. Pemberton did not get any interest in 'Koke,' or the 'Koke' formula (Rec., 1615). \* \* \* After that Mr. Bloodworth and I continued in business. \* \* \* He and I went on as partners. \* \* \* He and I owned the business

equally (Rec., 1615). \* \* \* We moved then around from the South Pryor St. Place to Trinity Ave., in a little cottage we got for a good deal less money (Rec., 1591). \* \* \* Mr. Bloodworth kept the books, I did what manufacturing was to be done (Rec., 1591). \* \* \* Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895,—right after the Cotton States Exposition, after the fair there, 1895,—and then I bought out Mr. Bloodworth (Rec., 1615). \* \* \* After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America. I have sold it in receptacles labeled with the name 'Koke' during all of that time (Rec., 1616-17). \* \* \* Paper marked Defendants' Exhibit 63 is the charter of the Koke Company of America. I sold the Koke Company of America all my interest in everything I had in the 'Koke' business. \* \* \* The Koke Company of America has continuously owned the 'Koke' business \* \* \* from its organization down to date. The Koke Company of America sell to their agents,—give them a license to do business in a certain territory. The Southern Koke Co., Ltd., is just an agent to the Koke Company of America,—a selling agent,—\* \* \* and the Koke Company of Texas,—all the same,—are licensees for certain territory." (Rec., 1617-18).

The continuous manufacture and sale of "Koke," from 1888 to date, is shown by the following witnesses:

Thomas C. Banks (Rec., 1411).  
 Miss Marion Bloodworth (Rec., 1267).  
 H. C. Groves (Rec., 1213).  
 L. A. Holley (Rec., 1274).

<sup>1</sup>George R. Edmondson (Rec., 1299-1300).  
 S. T. Mayfield (Rec., 1457, et seq.).  
 W. F. Boylin (Rec., 1073).  
 W. M. Sidebottom (Rec., 1162).  
 J. B. Freed (Rec., 1172).  
 P. B. McGraw (Rec., 1313).  
 C. N. Baker (Rec., 1406).  
 J. W. Mayfield (Rec., 1518, et seq.).  
 R. J. Baker (Rec., 1302).  
 M. Casey (Rec., 1305).  
 W. B. Arnold (Rec., 1308).  
 Oliver Prince (Rec., 1319).  
 G. W. Freeman (Rec., 1327).  
 W. F. Neal (Rec., 1328).  
 A. S. Joseph (Rec., 1330).  
 Mrs. M. L. Edwards (Rec., 1336).  
 H. O. Adams (Rec., 1343).  
 E. D. Montgomery (Rec., 1356).  
 A. F. Watkins (Rec., 1377).  
 John Smith (Rec., 1387).  
 J. C. Mayfield, Jr. (Rec., 1565).  
 L. E. Whitmire (Rec., 1699).

When this case was before the Patent Office, the Examiner of Interferences, in a decision which was later affirmed by the Commissioner of Patents, and which plaintiff now insists is *res adjudicata*, held upon this same record:

"That the Pemberton Medicine Co., of Atlanta, Ga., made and sold, during the period from 1888 to 1898, in containers bearing the label 'Koke,' a product which was used in the making of a soda fountain beverage, is held to be established."

And again, after stating that it was the Coca-Cola Company's contention that Mayfield used the name "Koke" for the first time in June, 1909, the Examiner proceeded:

"It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word 'Koke' as a name for a soda fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote 'Celery-Cola.'"

## SCHEDULE II.

### **The Attack Upon J. C. Mayfield.**

The purpose of this attack on Mr. Mayfield is well stated in Elliott's General Practice, Vol. 2, Sec. 841, p. 1010, under the title, "Articles of Evasion," as follows:

"Evasions assume many forms. A common mode of evading the real question is to assume that wrong has been perpetrated, or a crime committed, and to vehemently denounce the wrong or the crime. \* \* \* A skillful sophist very often directs attention from the failure or insufficiency of proof by keeping the attention of the jury fastened upon the consequences of the wrong which he attributes, by a sly and groundless assumption, to the party against whom he pleads. It is not uncommon for cunning advocates to direct their main attack upon some particular witness or witnesses, and to assume that the whole case rests upon the testimony of the witness or witnesses thus assailed, ignoring entirely all other testimony. \* \* \* In many instances the force of evidence is evaded by a stormy attack upon the character of a party, leaving entirely out of consideration the fact that even a bad man may have a good case well proved."

Plaintiff says Mayfield was not making "Koke" in Birmingham in 1905 and 1906, because, in a letter to Pogue, he used the phrase, "Celery-Cola" is my all." If the phrase were entitled to the force which plaintiff attributes to it, then it would mean that Mayfield was then making nothing but "Celery-Cola." The truth is, how-



ever, as admitted by numerous witnesses for the plaintiff, that Mayfield and his companies at that time were making numerous soda water flavors, besides selling vinegar, and their products.

For instance, D. E. Moody says, "We bottled a general line of soda water" (Rec., 1888). B. U. Hopper says he worked for the J. C. Mayfield Mfg. Co., and that he knew of that company, and of the Celery-Cola Co., from 1904 to 1906 (Rec., 1891). He then says: "I don't know just whether I could tell all the soft drinks they manufactured, or not; they manufactured a lot of soda water extracts and syrups that they sold" (Rec., 1891). W. M. Smith says (Rec., 1893): "'The Mayfield Mfg. Co. was engaged in 'Celery-Cola,' 'Pepsin-Ola,' 'Hop-Ale,' cider, and vinegar, and stuff like that.'" He says he was with the Mayfield Co. from about 1902 to 1907 (Rec., 1893). J. T. Ensley (Rec., 1901) says he worked for the Mayfield Mfg. Co. from about 1900 to about 1906, and that "they put out all the popular flavors, I believe, such as lemon extracts and syrups, vanilla, strawberry, and all the soda water drinks, and 'Vig-O,'—a specialty drink,—'Pepsin-Ola,' 'Peppo-Ade,' 'Celery-Cola.' \* \* \* They also sold different kinds of wine and 'Hop Ale.'" Thomas Dickson (Rec., 1907) says: "They were making 'Celery-Cola' and 'Pepsin-Ola' and soda water and such things as that." Tom Anderson (Rec., 1913) says they bottled 'Celery-Cola,' ginger ale, and all the different soda water flavors.

'The statement that "the Government prosecuted May-

field and associates concerning 'Celery-Cola' (U. S. v. Mayfield, 177 Fed., 765), and, upon conviction for violation of the Food & Drugs Act, the affairs of the Celery-Cola Co. were wound up, the formula for 'Celery-Cola' changed, and the revised product rechristened 'Koke,' " is highly misleading. It contains just enough truth to lend color to the statement; the rest is fiction.

There were four concerns altogether connected with the sale of "Celery-Cola" in Birmingham. The J. C. Mayfield Mfg. Co., a Tennessee corporation (Rec., 2423) of which J. C. Mayfield was president (Rec., 2423), was the owner of the "Celery-Cola" formula, trade-mark, and business, Mayfield having conveyed the same to that concern upon its organization at Nashville, Tenn., in 1903 (Rec., 2432). The Celery-Cola Company was an Alabama corporation having a license from the J. C. Mayfield Mfg. Co. giving it the exclusive right to sell "Celery-Cola" at wholesale within certain States (Rec., 2432). Mayfield was also president of this company, and a stockholder therein. The Birmingham Celery-Cola Co. was also an Alabama corporation (U. S. v. Mayfield, 117 Fed., 765). It had a sub-license from the Celery-Cola Company for part of its territory. The Celery-Cola Bottling Co. was still another Alabama corporation (Rec., 1683). It was a bottling concern having the exclusive right to bottle "Celery-Cola" in Birmingham and its suburbs.

It was the *Birmingham Celery-Cola Co.* whose officers and agents were prosecuted in *U. S. v. Mayfield*, 177 Fed.

765. Concerning this case, J. C. Mayfield said (Rec., 1600):

"A wholesale drug firm in New Orleans ordered a gallon of 'Celery-Cola' syrup. They expressed it to them, and it was carried down through their shipping department, turned over to a chemist,—a U. S. chemist,—and they reported that they found cocaine in 'Celery-Cola.' I was notified of it. I was out west. I notified my chemist, Van Deusen, about it. Of course, we knew it had no cocaine in it when it left the St. Louis [plant], and we could not account for it. Mr. Van Deusen came on up to New Orleans, and explained here to the chemist that there was no cocaine in our goods, but they contended that they found it in that sample. But we had, up to the time of the passage of the Pure Food Law, and when it took effect, of course used the fluid extract of coca, and we had the goods all over the country in the hands of the bottlers and the fountain men. We tried to get it back. We thought we did have the most of it back. I remember very well of destroying quite a lot of it. But it was found that some of this returned goods was in the plant there, and they used it. We had two or three ways to account for that; either they used some of the goods made prior to this act going into effect, which had been shipped back, or they had experimented a little themselves, or had put [it] in after it left the factory. \* \* \* I do not believe I was ever a stockholder of record, but they did get a suit against them back there in the court in connection with this sample of 'Celery-Cola' that had cocaine in it, and my name was mentioned in the suit. The other *partners* [parties] who were connected in the business cared nothing about it, because the business had been

wound up by the bankrupt court, and there was no defense, is my understanding. In fact, I was never served with a summons, was not present, and presume they just took the shortest and quickest way out of it."

After this trial the manufacture and sale of "Celery-Cola" was not discontinued, nor was the use of the name "Celery-Cola" abandoned. The *Birmingham Celery-Cola* Co., which was merely a licensee of the J. C. Mayfield Mfg. Co., had already been wound up in bankruptcy before the trial took place (Rec., 1601), but the winding up of that concern no more stopped the manufacture and sale of "Celery-Cola" than would the bankruptcy of any other jobber or wholesale dealer wind up the business of any other manufacturer. "Celery-Cola" is still being manufactured and sold by the J. C. Mayfield Mfg. Co. (Rec., 2446). The formula for "Celery-Cola" was not changed after this trial,—which did not occur until 1910 (*U. S. v Mayfield, et al.*, 177 Fed., 765),—it was changed in 1906 upon the passage of the Food & Drugs Act (Rec., 1601). Plaintiff argues that because Mayfield changed the formulas of both "Koke" and "Celery-Cola" at that time, so as to eliminate the cocaine and comply with the law, therefore he was making only "Celery-Cola" and not "Koke." (Plaintiff's original brief, p. 97). "Koke" contained the fluid extract of coca, prior to the passage of the Food & Drugs Act, just as plaintiff's product did, and just as "Celery-Cola" and all the other cola drinks did, and it was as necessary for Mayfield to eliminate the cocaine from

"Koke" as it was for him to eliminate it from "Celery-Cola," or for plaintiff to eliminate it from "Coca-Cola."

The assertion that, upon the conviction of the officers of the Birmingham Celery Cola Co., in 1910, Mayfield then changed the formula for "Celery-Cola," and re-christened the revised product "Koke," is pure fiction. There is nothing in the record to support the statement, and plaintiff has cited no page of the record where anything justifying the assertion can be found. On the contrary, it is admitted in the very next breath that Mayfield was making and selling "Koke" in Shreveport, La., at least as early as *June 1st, 1909*, whereas this trial did not take place until *March, 1910*.

Plaintiff shows remarkable powers of deduction on page 97 of its original brief. It quotes from Mayfield's deposition (Rec., 2414) as follows:

"The Coca-Cola Co., or somebody, gave me a black-eye with 'Celery-Cola.' It was dragged through the express company, the wholesale company, and the drug company of New Orleans, *and I put the name Koke*,—I was having these names registered in the States. I was kinder afraid of the Federal law, don't you see?"

And then gets off the following remarkable deduction:

"*Put the name Koke*,—of course, put the name Koke *on his revised Celery-Cola* and used it in 1909 for the first time," etc.

What Mayfield evidently started to say was that he "put the name Koke" *on record in the several States*,—referring to the State registrations which he secured in the latter part of 1910 (See Defendants' Exhibits 130 to 155, inclusive),—and that he applied for State registrations instead of a Federal registration in the Patent Office because he was afraid the notoriety resulting from the case of *U. S. v. Mayfield, et al., supra*, might have prejudiced the Government against his various products.

Plaintiff argues that, because in four (Plaintiff's Rebuttal Exhibits 85-86, 88, 89) out of twenty-six (Defendants' Exhibits 130 to 155, inclusive) of the applications for State registrations, the printed forms to be filled in used the word "trade-mark" instead of "label" in the space provided for the applicant's declaration as to the length of time "since which" the trade-mark or label had been in use, and that because the date which Mayfield placed in these blank spaces was "June 1st, 1909," therefore he admitted thereby that he had never used the word "Koke" prior thereto. The fact is that, after the Birmingham trial, he got up new labels for both "Celery-Cola" and "Koke" on which the statement was printed in box-car letters, "absolutely free from cocaine!" (See the specimens of labels attached to defendants' Exhibits 130 to 155, inclusive.) He felt this course necessary to off-set the damaging tales plaintiff's salesmen were telling the trade wherever they went. Being a layman, he probably thought that a "trade-mark" and a "label" were the same thing, and as this new design of "Koke" label had not been in use but a short



time, he inserted in the applications the length of time since which he had used that particular design of label. For instance:

J. C. MAYFIELD (Rec., 2413-2416):

"You hand me Plaintiff's Rebuttal Exhibit 84, and ask me if that is not an exemplified copy of the application which I signed; I was getting them all over the country,—I will say yes. You ask if I did not state in that application the following, referring to 'Koke': 'The same has been in use by applicant since June 1st, 1909;' I will say this, I had reference to this particular label,—keg and barrel label,—I was registering. I had reference to that particular label. I had no reference to the name 'Koke' at all, except that particular label. I attached the label to the application, so I would be on the safe side. \*

\* \* You present me with Plaintiff's Rebuttal Exhibit 85, which you say is an application to the Secretary of State of Indiana. \* \* \* You ask if I made this statement in my application, printed on it: 'Length of time, if any, during which trademark "Koke" has been in use? A.—Since June 1st, 1909;' I had attached to my application to that state, as I did in this particular instance, that particular label. My label does not appear on the copy of the application you present me, but it did on the application which I made. I attached it to all of them. \*

\* \* 'That was when I had that particular label made. I was referring to the label 'Koke,'—that particular label. You hand me a copy of the application to the State of Massachusetts, marked Plaintiff's Rebuttal Exhibit 86, and ask whether I signed the affidavit in that; well, they have not got my label attached thereto, which I attached to all the differ-

ent state applications. I will say that copy presented to me is incomplete. You ask if I made this statement: 'Length of time, if any, during which the trade-mark has been in use?' Since June 1st, 1909'; I meant this particular label. I did not mean the *name* 'Koke,' but the *label* that I attached thereto, to every trade-mark I had in each state. \* \* \* You hand me Plaintiff's Rebuttal Exhibit 88, being a copy of the application for the State of California. \* \* \* You ask if I did not swear in that application that: 'This trade-mark consists of "Koke, a beverage."' This trade-mark has been used in its business since the 1st day of June, 1909; not the trade-mark, I meant this particular *label* that goes on the kegs and barrels. That is what I referred to. The *word* 'Koke' had been in use since 1888. But this *label*, as you have got in the preceeding one (Plainwhat I had reference to. You present me with a copy of an application to the State of Pennsylvania, marked Plaintiff's Rebuttal Exhibit 89. \* \* \* You ask if I did not state in that application: 'The trade-mark consists of the word "Koke;" the length of time, if any, during which it has been in use,—fourteen months;' I had attached thereto this particular *label*, as you have got in the preceding one (Plaintiff's Rebuttal Exhibit 84), I had that made,—that is what I had reference to,—but the *word* 'Koke' had been in use in different shapes and different forms for years and years prior thereto, but I had reference to this particular *label*! I was getting State registrations on *labels*."

The majority of the applications had the word "label" instead of the word "trade-mark," and the question asked of the applicant was: "Length of time, if any, since which this *label* has been in use." (See Defendants'

Exhibits 130 to 155, inclusive.) These applications were all made at about the same time, and Mayfield probably read a few of them hurriedly, and seeing that the information required in those which he read, was the length of time during which he had used the particular design of *label* which he was required to attach, supposed that all the rest were the same, and filled in the blank spaces without reading the printed matter. Even if he had noticed that some of them read "trade-mark" instead of "label," that wouldn't have meant anything to him, for he shows in the above extract from his testimony that he didn't know the difference between a "trade-mark" and a "label." Indeed, the person who got up the application blank for the State of Nebraska evidently didn't know the difference either, for, in the application to that state (Plaintiff's Rebuttal Exhibit 87), the printed form reads, "The said trade-mark *or* label has been in use since ....."

Then plaintiff refers to the fact that in 1911 J. C. Mayfield, on behalf of the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, the registration of the word "Koke" in the Patent Office which they obtained in 1905, (See Defendants' Exhibit 129) and that later this registration was put in interference with an application of W. L. Bitting, of Sherman, Texas, to register the word "Koke," and that Mayfield, on behalf of the Koke Company of America, bought Bitting's application (See Defendants' Exhibit 128); and plaintiff argues from this that Mayfield had not used the word "Koke" before Christy & Huggins and W. L. Bitting began to

use it, "because," plaintiff says, "if he had, it is unlikely that he would have bought these registrations."

J. C. MAYFIELD (Rec., 1603, 1664, 1674, 1675):

"That was in 1911. I heard from some traveling men along there that,—I forget just how I got it,—there was a firm in Murfreesboro that owned a trade-mark on 'Koke,' and [that] I was spending a lot of time and money in building up the business for them. \* \* \* I went to see them and found out it was true. They were doing a pretty nice business, they said, and showed me their registered trade-mark. I explained to them my long usage. I knew I could win out in the courts, but did not care to do that. They had done some advertising, popularizing my 'Koke,' and finally I said, 'Let's see if we can't get together on a business proposition.' Well, we did. I bought the 'Koke' for the U. S., except the State of Tennessee (Rec., 1603). \* \* \* I was using that label long before I heard of the Murfreesboro people having a trade-mark (Rec., 1664). \* \* \* W. L. Bitting lived in Sherman, Texas. \* \* \* He had the label registered quite a while,—since '98,—and the first I paid any attention was when he filed his papers in Washington for a trade-mark based on this registered label (Rec., 1674). \* \* \* Mr. Bitting undertook to change his registered label to a registered trade-mark, and I had the Murfreesboro registration of record in my name, and I received notice of Mr. Bitting's application, and that is where I got hold of it. I got this assignment from Bitting rather than fight it out. My attorney said we could beat it out, and thought it best not to buy. I said I thought it was the cheapest, quickest, and most satisfactory

way. \* \* \* I bought it more to get it out of the way. It was a cloud on my title, and that was the most satisfactory way to get rid of it." (Rec., 1675).

Then plaintiff argues that Mayfield did not use the word "Koke" prior to 1909 because in the license from the Koke Company of America to the Southern Koke Co., Ltd., (Plaintiff's Exhibit 174) it is recited that the Koke Company of America is the owner of a Patent Office registration of the word "Koke," which registration it obtained by purchase from the Murfreesboro Bottling Works. This is most remarkable logic. It is not pretended that either Mayfield or the Koke Company of America ever obtained a *registration in the Patent Office* of the word "Koke" until the Koke Company of America, acting through Mayfield as its president, bought the Murfreesboro registration to remove it as a cloud on his title, which rested therefore solely upon priority of adoption and use.

Then it is said that because Mayfield did not mention his priority of usage in several letters he wrote Christy & Huggins concerning the Bitting interference, but did make the statement that "this party *claimed* priority to right so I understand," therefore Mayfield did not use the word "Koke" prior to 1909. This is another wonderful specimen of logic. What object could Mayfield have had in telling Christy & Huggins in these letters that *he* had used "Koke" since 1888? Christy & Huggins couldn't testify as to *Mayfield's* use of the word. All they could testify to was *their* use, and Mayfield was inquiring of them as to *their* use, when he learned of the

Bitting interference, to ascertain whether or not *their* testimony as to *their* use of the word would be of assistance to him in the then impending fight with Bitting. Of course, he informed them what the issue was that the interference raised,—a question as to priority of use,—and explained to them, so they would know on what point he wanted them to give him information, that Bitting *claimed* to have had priority of use. As he had already bought the Murfreesboro registration, and had the assignment recorded in the Patent Office in the name of the Koke Company of America, if Christy & Huggins could have proved use of the word “Koke” by them prior to 1898 it would have saved Mayfield the trouble and expense of looking up the witnesses to prove his own use of “Koke” since 1888, for he could have defeated the Bitting interference on the strength of the Murfreesboro title without having to go into his title at all

Plaintiff evidently took its line of reasoning from its bottler, J. W. Huggins, who said (Rec., 2024):

“It strikes me as very strange that if he [Mayfield] ever used the word ‘Koke’ prior to 1911 he would buy it and not mention it to me. No, sir, I am not aware of the fact that prior to the time he called on me he had actually registered the word ‘Koke’ in every state in the Union. He never mentioned it to me. I think if that had been a fact he would have mentioned it,—I feel certain he would.”

As a matter of fact, Mayfield had registered his label,



with the word "Koke" on it, in practically every state in the Union more than a year prior thereto. (See Defendants' Exhibits 130 to 155, inclusive, and Defendants' Exhibit 156).

Then plaintiff flourishes the "Rice Record" with much gusto. This is a transcript of the evidence in a case tried in 1907 before the police court of Birmingham in which a scamp by the name of Melville Rice, who had been a book-keeper in the employ of the J. C. Mayfield Mfg. Co. at Birmingham, was prosecuted for grand larceny for stealing the "Celery-Cola" formula (Rec., 2419). Rice was found guilty and bound over to the grand-jury (Rec., 2419; Plaintiff's Rebuttal Exhibit 8), but at the trial before the police judge Rice's attorney, at the instigation of Mrs. Diva Brown, Mayfield's ex-wife, who was present and supplying the attorney with the material for his cross-examination (Rec., 1905-6, 1987), made such a strenuous effort to force Mayfield to reveal every detail of his formula in all its minutiae, and was allowed so much latitude in this respect by the magistrate, that Mayfield evidently decided not to go before the grand-jury, and not to appear in the case again as a witness, for fear they might repeat the inquiry into his formula, and force him to divulge not only the "Celery-Cola" formula, but even his "Koke" formula. So the proceeding was dropped. Rice, however, admits that he was guilty. He says (Rec., 1987) :

"No, sir, I never made a drink called 'Caffa-Cola.' \* \* \* I was experimenting somewhat on my

own account with a drink which I intended to call 'Caffa-Cola.' Oh, yes, I had considerable stationery with that name printed on the heading, and that stationery was found in my room when the officers went there,—they found everything that was up there."

Plaintiff insists that Mayfield is impeached as a witness because, when he was asked in New Orleans on March 10th, 1915, concerning this Rice case, "You were not at the hearing?" he replied, "No, sir;" and then, later, when recalled to the stand in Chattanooga on July 5th, 1915, he said that if the record showed he had said, "No, sir," in reply to that question it must have been a typographical error, because he was present at the trial before the magistrate and would certainly have answered "Yes, sir," to a question of that kind, and believed that he had in fact so answered. If the stenographer correctly transcribed his notes, it is probable that what Mayfield had in mind when he answered, "No, sir," was the hearing before the grand-jury. The question asked of him was, "You were not present at the hearing?" The previous question was, "But he was *prosecuted*?" to which he replied, "I do not know, only about the *case*." Then followed the question, "You were not present at the *hearing*?" A.—No, sir." He knew that he had not been present at the hearing before the grand-jury to prosecute the case in the criminal court, and that he had only attended the preliminary investigation before the magistrate, and when he was asked if Rice was "prosecuted," and, immediately after, if he was present at the "hearing," he evidently misunderstood the question and

thought he was being asked about the proceedings in the higher court. It is not uncommon for laymen to become confused when they encounter legal terms. Then, again, many of Mayfield's answers were given by simply shaking or nodding his head. He had to be repeatedly cautioned to speak out, and not to nod, as the stenographer couldn't get the "nod" in his notes. It may be that he nodded, "Yes, sir," and the stenographer just assumed that he had shaken his head for, "No, sir."

It is somewhat surprising to find counsel asserting that, if Mayfield had answered, "Yes, sir," they would have proceeded to question him further about his testimony in that case, and confronted him with the transcript of his testimony, in view of the fact that plaintiff only succeeded in getting the "Rice Record" admitted in evidence, over the objection of defendants, upon the express representation of counsel that they did not have that record at the time they first cross-examined Mayfield in New Orleans on March 10th, 1915, and did not then know of its existence. (Rec., 1942, 1880).

HAROLD HIRSCH, Esq., General Counsel for the Coca-Cola Co., (Rec., 1942):

"I wish to state that the transcript of the record in the case of the *State v. Melville Rice* was received by me on or about the middle of May, 1915, from Birmingham, Alabama, and that it was only a short time before that that I had any knowledge of the existence of this transcript of this record, and that

I had no knowledge of it at the time Mr. Mayfield was on the stand in New Orleans."

Defendants objected to the introduction of this record because no foundation had been laid for it in the examination of Mr. Mayfield, in that he had not been asked concerning the testimony appearing therein prior to the introduction thereof (Rec., 1880). Of course, if counsel actually had the record at the time they examined Mr. Mayfield in New Orleans, as they now intimate, then that record should never have been admitted at the time plaintiff offered it, and it should now be stricken because its admission was obtained by misrepresentation and fraud.

When the court below admitted this record in evidence, defendants then offered the "Rucker Record" in evidence, under precisely the same circumstances as were represented to exist in the case of the "Rice Record." Candler, Robinson, Dobbs, etc., had not been asked on cross-examination to explain their testimony in the "Rucker Record," for the reason that counsel had not heard of that record, and did not know of its existence, until after all the depositions had been taken for both sides, and the time for taking depositions had closed, and they did not receive a copy of its until two or three days before they started west for the trial of this case at Prescott, Arizona. When they offered the record in evidence, they also offered to give Candler and the other witnesses an opportunity to appear and make such explanations as they might desire to make, but the offer was declined. The court below admitted

the "Rice Record," but excluded the "Rucker Record," to which action defendants' duly excepted. (Rec., 2501). Error was not assigned to this action of the District Court because of the rule requiring exceptions to the admission or rejection of evidence to "quote the full substance of the evidence admitted or rejected." Both records had been misplaced during the year intervening between the trial of the case below and the entry of the decree therein, and were not found until after the time for filing the assignment of errors had expired. It is insisted, however, that the rejection of the "Rucker Record," under the circumstances, was "a plain error occurring on the face of the record."

The main thing harped on in the "Rice Record" is the "Dear Judge" letter. Mr. Mayfield's explanation of this much overrated document is satisfactory and complete, and is borne out by the record in every detail. It completely refutes the inference sought to be drawn and removes the last suspicion of bad faith.

J. C. MAYFIELD (Rec., 2419):

"This 'Dear Judge' was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented \* \* \* but at times she had rational intervals, and at those times she was very grasping,—making money,—and from the fact that I bought out the 'Coca-Cola' business while she was my wife, she thought she was entitled to a copy of

the 'Coca-Cola' formula, notwithstanding the fact that she made a final settlement with her attorney that was satisfactory. This letter was written several years after our divorce. She demanded of me a copy of that formula. I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business,—I had no objection, because my son was her son. I was over there once or twice, and she realized the value of the 'Coca-Cola' formula,—or the 'Koke' formula, which was the same,—and thought if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, to the effect that I had misplaced the formula,—lost it here, yonder, or some place else,—and that I would get it. I wrote her and wrote Brown several letters along that line, but she was so very anxious to get it that she came to Boston. \* \* \* When I wrote this letter in question she was there. I gave it to her. She came there for it. As I said before, she was demented. I wrote that letter, and I wanted to make it ring with a genuine ring, so that she and Judge Brown, who was her lawyer,—he was her husband, but he was a lawyer, of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City or New York on Monday. I was not there, and did not go. If I had gone and given her a copy of my formula, and taught her and Judge Brown how to make 'Koke,'—'Coca-Cola,'—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go because it was practically my all. I came on back home. I realized what I was up against,—a woman who was demented and deter-



mined to have a copy of this formula,—and, being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came on to Atlanta, and then to Birmingham. Because I did not do what I promised to do, she appeared in this Rice case for no other reason in the world except to get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions, largely, that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those oils, and all those things,—she, in a measure, did,—that is what she was after. She had possibly a superficial knowledge of the formula, and she wanted facts,—the proportional parts,—and, by being there, she hoped to get them. I evaded, in a way, a great many of her questions,—those which did not apply to the case at issue,—knowing that she was not at herself. I had the city physician of Birmingham, Alabama, to be present at that time, and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and she had demanded a copy of the ‘Coca-Cola’ formula,—or the ‘Koke’ formula,—and I had told her and Judge Brown that I had lost it, or misplaced it, and she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it, because I was making ‘Koke’ in Jersey City at that time from

the original 'Coca-Cola' formula,—I do not mean I was making 'Koke' in Jersey City at the time of the Rice trial, I am talking about Jersey City when I wrote this letter, and she was in Boston demanding of me a copy of that formula and the certificate from me that it was the original 'Coca-Cola' formula. I would not give it, but evaded her and put her off with the excuse that I had lost it, in order to get rid of the woman that was not at herself. I was trying to protect my property."

S. T. MAYFIELD (Rec., 1458):

"My father stayed in Atlanta until about 1898, —about 1897 or 1898, and when he left there he went to New York. \* \* \* I stayed in New York for about a year, or a year and a half. When my father went to New York he manufactured 'Koke.' He manufactured it in Jersey City (Rec., 1458). \* \* \* I do not know just how long father was in New York. I cannot remember the exact time. I was with him about a year and a half. He manufactured 'Koke' over in Jersey City, on Warren St., as I remember it. \* \* \* With my father there in Jersey City, besides myself, was my mother and her husband, Judge Brown. She married Judge Brown at that time. Judge Brown lived in Jersey City." (Rec., 1470).

J. C. MAYFIELD (Rec., 1593-4):

"The Wine of Coca Co. people decided that they wanted to open an office in Boston [in 1898], and they wanted me to go to Boston to establish same there. \* \* \* I did go, and I thought I would just move my 'Koke' business to New York. \* \* \* My

son went ahead of me and picked out a little place in Jersey City. I would go over there often from Boston and manufacture goods for him. I did not manufacture every time, it was in the winter, but I would go over there and see how he was getting along."

Of course, Mrs. Diva Brown knew that he was making "Koke" in Jersey City, and of course she knew he was making it by the original "Coca-Cola" formula, which she knew he had obtained from old Dr. Pemberton in 1888.

J. C. MAYFIELD (Rec., 1682):

"After Mrs. Diva Brown left me, I have heard she went around the country claiming to have the original 'Coca-Cola' formula, and selling it. \* \* \* She was making her own living, and that was the way she had of doing it."

FOHN D. FLETCHER (Rec., 1092-1095):

"I bought my drink from a man named Murphy, J. C. Murphy. He first called it 'Murphy's Cola.' (Rec., 1092). \* \* \* 'The formula of 'Murphy's-Cola' was made by J. S. Pemberton, I suppose. That probably would be absolutely true, but I do not know. The formula I used subsequently, afterward, was sworn to by Mrs. Diva Brown as having been the original J. S. Pemberton formula. Mrs. Brown,—I understand she is dead now,—she afterward married a man in Birmingham. I never met her in my life. I understood that she was married to J. C. Mayfield; she is supposed to be the same

woman. I got my information from an affidavit, that the formula I bought from Mr. Romine, of Pulaski, in the year 1905,—I believe it was 1905,—he bought the formula from Mrs. Brown, who swore in that transaction to the affidavit she presented in the litigation I had with the Coca-Cola Co. as having been the original 'Coca-Cola' formula as put up by Mr. Pemberton in the preparation of 'Coca-Cola.' (Affidavit of Mrs. Brown): 'United States of America, State of Louisiana, Parish of Orleans, City of New Orleans: Personally came and appeared before me, the undersigned authority, Mrs. D. Brown, who, after being duly sworn, deposes and says: 'That this is the original "Coca-Cola" formula, owned and used *by her* before it was sold to the present Coca-Cola Company, of Atlanta, Georgia."

E. J. Smyly says (Rec., 1393) that Mrs. Diva Brown, who claimed to have been an ex-wife of J. C. Mayfield, sold him an alleged "Coca-Cola" formula in 1907. In a little pamphlet gotten out by her, part of which was read into the record by plaintiff (Rec., 1096-8), Mrs. Diva Brown made the statement that she was one of the members of the Pemberton Medicine Co.,—to which Dr. Pemberton transferred all his formulas and business, including the "Coca-Cola" formula and business,—in association with Dr. Pemberton, Murphy, Bloodworth and Mayfield. It is plain, now, why she got E. H. Bloodworth to make the affidavit he is alleged to have made on July 18th, 1905 (Rec., 1681) to the effect that:

"In 1888 *A. O. Murphy*, of Barnesville, Ga., and *J. C. Mayfield*, of Alabama, and *myself*, bought Dr.

Pemberton's formulas, including 'Coca-Cola.' Mrs. D. Brown was then the wife of J. C. Mayfield. *She was not known to us as a member of the Pemberton Medicine Co.*, but she spent considerable time in our laboratory, and took a great deal of interest in our business."

This evidently did not satisfy Mrs. Brown, so she got Bloodworth to make another affidavit on August 9th, 1905, reading this way (Rec., 1265):

"In 1888 A. O. Murphy, of Barnesville, Ga., *Mrs. Diva Brown*, and myself bought Dr. Pemberton's formulas, including Coca-Cola. Mrs. Diva Brown spent considerable time in our laboratory and took quite an interest in the business."

J. C. MAYFIELD (Rec., 1682) in referring to this affidavit, said:

"I have seen the whole thing. It is not true. This is true, that A. O. Murphy, of Barnesville, and J. C. Mayfield, of Alabama, were connected, but my wife had no connection whatever."

And again (Rec., 1679-80):

"XQ.—And Mrs. Diva Brown was around the plant in Atlanta, Ga.,—she was Mrs. Mayfield at that time,—was around the plant in Atlanta, Ga., was she not, when you first started to manufacture? A.—No, sir, she was not there in 1888. \* \* \* She was not around the place. Nobody ever saw her around there during the first business there, 1888 or 1889."

A. O. MURPHY (Rec., 1290):

"She had no interest in the business at that time, or during the time I was associated with it, whatever,—nothing to do with it."

MELVILLE RICE (Rec., 1986-1987):

"I was the defendant in the case of *The State v. Melville Rice* that was tried in Birmingham, Ala. \* \* \* Yes, sir, I remember the introduction of a letter in that case signed 'Jack' to 'Dear Judge.' \* \* \* I think the letter was introduced by Mrs. Brown, who took possession of it after it had been read in court. \* \* \* This Mrs. Brown was Mayfield's former wife,—Mrs. Diva Brown. She was present in the court room at the time of that trial, and I believe she did supply Judge Allen with the dope for his cross-examination."

B. M. Allen (Rec., 1905-6):

"I am an attorney-at-law and live in Birmingham. \* \* \* Yes, sir, I remember a case in 1907 tried before Judge Bonner,—at that time it was called the Inferior Court,—entitled *The State v. Melville Rice*. I was attorney for the defendant in that case. \* \* \* I remember what the man was charged with, I think, and what the general line of inquiry was,—he was charged with stealing some syrup, I believe, something of that sort, also some supposedly wonderfully valuable formulas,—I know *I tried to find out what they were*. \* \* \* There was also a lady, who had formerly been *Mrs. Mayfield*, who was *interested in the case*."



J. C. MAYFIELD (Rec., 2436):

"She was after all the information she could get about the 'Koke' formula, or the 'Coca-Cola' formula. I had evaded giving it to her in every way possible. She stated in some of her advertisements and things that she had the original 'Coca-Cola' formula. \* \* \* If I had given her the copy of the formula \* \* \* she would not have appeared in this case, but not having it, and not being able to sell the formula as she wanted to, she appeared in this case and sought all the information possible, and that is why those questions were asked. I evaded them along that line, because they were immaterial and did not have any bearing on the case at issue. \* \* \* At the time of this trial,—April 19th, 1907,—she had not a satisfactory formula. She did, however, after that, in some manner get a satisfactory formula, or, rather, a formula,—I do not know that it is a satisfactory formula,—but a formula that made a good cola beverage. I know she got a lot of it in this particular trial, and, as Rice had stolen my 'Celery-Cola' formula, I have reasons to believe that Rice gave her a copy of the 'Celery-Cola' formula."

Plaintiff then arranges a "deadly parallel," on pages 69 to 78 of its brief, in which, however, there is nothing of any importance in the way of a contradiction. It is true that Mayfield said that Mrs. Diva Brown, his former wife, may have helped him a little, together with his son and Mr. Bloodworth along in '93 up to '94 or '95, and, when asked if she was familiar with the formula that he got from Dr. Pemberton, replied, "Well, I could not answer that,—she had opportunities, helping

around there, to get familiar with it, and what a wife would have with a husband's business;" and it is true that Steve T. Mayfield used the expression, "My mother and John McCowan made 'Koke' at that time." But Mr. J. C. Mayfield goes on to explain ( Rec., 2427-2428 ) :

"I will state this in the way of explanation. There are two formulas; one is a scientific formula—making the extracts, the flavoring, the compound; and the other is a mixing formula, a manufacturing formula. \* \* \* The scientific formula is compounding the essential oils and making the fluid extracts,—as we use now, tea; prior to the Pure Food Law it was the fluid extract of coca leaves,—and making of the other things we needed in an extract form from the crude drugs. When we had the other people to do the manufacturing we would number these things,—No. 5 would mean a certain thing; No. 4 would mean caffeine, or sugar, or flavoring, or extract of some particular thing. That was a mixing formula, manufacturing formula, and the other was a chemical formula, a chemist's. Q.—Did anybody else besides you know the mixing formula? Oh, yes, my sons knew the mixing formula, but they did not know the scientific end of it. Mr. Britton knew the mixing formula."

In other words, Mr. Mayfield was conducting his business then on the same plan as the Koke Company of America now conducts its business. Mr. Mayfield always made the flavoring compound himself, personally, just as the Koke Company of America does today, but he showed numbers of people how to convert this flavoring extract into a syrup by mixing with it sugar, water,

glycerine, etc., in the prescribed proportions, just as the Koke Company of America now shows its various territorial licensees, and some of its bottlers, how to manufacture "Koke" syrup from the concentrated "Koke" compound which it manufactures.

For example, plaintiff's witness, John H. Bohne, who says he formerly "*manufactured*" "Celery-Cola" in St. Louis for the J. C. Mayfield Mfg. Co., there in 1903, says (Rec., 2043-4):

"I held the position of chemist when with Mayfield, and *manufactured* all the syrup. \* \* \* As a chemist, I did all of the *compounding* for Mayfield. \* \* \* I do not know just where the *savor* came from that he used in his 'Celery-Cola,'—*that was the only part that I did not manufacture*,—but I added that according to his instructions. What the formula called for, I did not analyze that. We had it sent up here in five and ten-gallon kegs, and we added that to the 'Celery-Cola,' the *flavor*. \* \* \* Mr. Mayfield turned the formulas over to me, *with the exception of the formula for the flavor.*"

TOM ANDERSON (Colored), plaintiff's witness (Rec., 1914-1915):

"I worked for Mr. Mayfield individually something like three or four weeks, and then I worked for the Celery-Cola Bottling Co. between two and three years. For the last named concern I mixed their drinks and bottled them, both. \* \* \* I made the syrup myself that was used by the Celery-Cola Bottling Co. The *extracts* were *made by someone*

*else*, and I had to mix the *extracts* with the *syrups* to make up the drinks they wanted."

JOHN T. ENSLEY (plaintiff's witness), who states (Rec., 1901) that he was connected with the Mayfield Mfg. Co. in Birmingham from about 1901 to about 1906, says (Rec., 1904):

"They had their *extract* business away from here part of the time, and manufactured, I believe, in St. Louis and Nashville. \* \* \* They shipped *extracts* from those cities to Birmingham. They had a branch house in St. Louis, I believe, and probably in Nashville. As a matter of fact, *Mr. J. C. Mayfield, Sr.*, made up his *extracts* most any place he was at,—get him a paddle and barrel and mixed up his extracts. He would go about the country and wherever he happened to be he would make up a batch of it, and, as I say, in St. Louis, Birmingham, and Nashville he made extracts."

W. J. CHEEVEIS (plaintiff's witness), in describing the part which the Southern Koke Co., Ltd., took in "making" "Koke," said (Rec., 595-601):

"That was before they began to *make* the drink in New Orleans. Then they began to *make* it here. \* \* \* The product I first knew of, from the time of the organization of the company, the syrup was shipped from St. Louis and was *mixed* on Howard Ave. after the tanks were put up. I never saw the syrup made,—that was made in St. Louis, as I understood,—but it was brought here in barrels and *sugar* added to it. \* \* \* The syrup came in and *they mixed it with sugar*, added the *extract* that they had

received from St. Louis, and added the *glycerine*, and then went ahead.'

J. C. MAYFIELD (Rec., 1668):

"What I considered the key-note of the whole thing was the *flavor*, and the boys always had a gallon or two of *extract*, and it was an easy matter to do the *mixing* of the other things."

That is evidently just what he did in Atlanta, also, when Steve Mayfield says, "My mother and John McCowan *made Koke*." They didn't compound the concentrated flavoring extract, they merely mixed that with syrup, just as Bohne did in the case of "Celery-Cola," and as Tom Anderson did. Of course, being around the plant, Mrs. Diva Brown had an opportunity to see the various packages of drugs and essential oils that were delivered there for Mayfield to use in making up the concentrated compound, and, therefore, to acquire some information as to what the various ingredients were; and, of course, she knew the "mixing formula,"—she knew how much syrup to mix with the flavoring compound, and, in fact, what proportions of sugar, water and glycerine to use in making up the syrup. As Mayfield says, "she had possibly a superficial knowledge of the formula," but "she wanted facts,—the proportional parts," (Rec., 2422) and that is what she didn't know but was trying her best to find out.

Plaintiff argues that Mayfield's statement to the effect that Mrs. Diva Brown didn't know the "Koke" formula cannot be true because "S. T. Mayfield swears

she did," and, hence, that the explanation of the "Dear Judge" letter is unpersuasive. But the vice in this argument is that S. T. Mayfield didn't say that his mother "*knew the formula*,"—what he said was that she and John McCowan "*made Koke*," which meant, of course, that they mixed up the syrup from the concentrated compound, which anybody could do. Why, even a negro, Tom Anderson, was capable of doing that (Rec., 1915).

But it is said that Mrs. Diva Brown sold a formula to Al. Campbell in 1907, which S. T. Mayfield says "was practically the same thing" as the "Koke" formula, and it is argued from this that Mrs. Brown must have known the "Koke" formula all along in order to be able to sell a formula so nearly like it to Al. Campbell. But this argument overlooks the fact that Mrs. Brown did not sell her formula until the latter part of 1907, that the Rice trial took place some time before that, and that Mrs. Brown got a great deal of information from Mayfield's cross-examination in the Rice trial, which undoubtedly enabled her, with the information she already had, to piece together a pretty fair cola drink formula. If it was a cola drink formula at all, it was bound to be "practically the same thing" as the "Koke" formula, because they are all more or less alike, just as all the root beer and sarsaparilla formulas are practically the same. Besides, the formula by which Houppert and Smyly had been theretofore making their "Dope" syrup was practically the same as the Diva Brown formula, except that the latter required the syrup to be boiled,



whereas, the former merely prescribed that it be mixed with cold water in a barrel.

E. J. SMYLY (Rec., 1393-4):

"No particular change was made in the formula, only we changed the way of making it. We used to, at one time, make it out of green syrup, but afterward got to cooking it in a kettle and mixing it in a tank. Mr. Houppert bought a formula from Mrs. Diva Brown. That formula was not very much different from ours. She specified in her formula that we had to cook the syrup,—boil it,—mix it in a mixing tank, where we had been making it in a barrel. \* \* \* The product we made prior to the time of buying this Diva Brown formula, so far as taste is concerned, tasted about the same,—a caffeine drink. The color was the same."

No doubt Mrs. Diva Brown knew how to properly prepare the *syrup*. She had done so for Mayfield years before. But that is a very different thing from knowing the *formula* for making the *concentrated flavoring compound*.

Then plaintiff quotes from the "Rice Record" as follows:

"Q.—Don't you advertise that you know how to make, and do make, 'Coca-Cola'? A.—I do not make it. I advertise the letter that Dr. Pemberton's wife gave me, that I once was associated with her husband in the manufacture of 'Coca-Cola.' Q.—And you knew how to make it before the present

Coca-Cola people got the formulas? A.—I think she stated that to me.”

J. C. MAYFIELD (Rec., 2438):

“The facts are that I did make ‘Coca-Cola’ before the present ‘Coca-Cola’ people bought Dr. Pemberton’s interest, and I had the ‘Coca-Cola’ formula. Mrs. Pemberton gave me that certificate,—certified it before a notary public,—because it was the facts in the case. You call my attention to the fact that in the answer above quoted I used the present tense: ‘I *don’t* make it,’—that is, that I don’t make ‘Coca-Cola’; I meant there that I did not make and label my goods ‘Coca-Cola,’ but I did make the same goods and label it ‘Koke.’ I did not say it there, but that is the facts in the case,—the same goods from the same formula.”

Why, if any one were to ask Mayfield today if he were making “Coca-Cola,” he would tell them, “No,” that he is making “Koke,” but that it is made according to the original formula for “Coca-Cola” that Dr. Pemberton originated, (except for the modification made necessary by the Food & Drugs Act). If he had been representing to the public that he was making “Coca-Cola,” plaintiff would probably have sued him long ago for unfair competition for attempting to sell his goods as its goods.

Then plaintiff parades the following except from the “Rice Record:”

“You claimed that the Coca-Cola people got

Pemberton's formula and that you were entitled to it? A.—No, sir, they bought it from Pemberton. Q.—You have been claiming all the time that you had the 'Coca-Cola' formula? A.—Not the 'Coca-Cola' formula."

Now, these questions were being propounded to Mayfield from the dope supplied by Mrs. Diva Brown, and it is evident that she knew Mayfield had made these claims all along, and that she told Judge Allen so, and got him to ask the questions so as to open the door for an examination into the 'Koke' formula. Rice was charged with *grand-larceny*, and the warrant stated that the value of the "Celery-Cola" formula was somewhere in the neighborhood of several thousand dollars,—at any rate it was of sufficient value to make its theft *grand-larceny* as distinguished from *petty-larceny*. It was stated that the "Celery-Cola" formula was a *secret* formula, hence its enhanced value as a trade secret. Allen adopted in his cross-examination the shrewd theory that, if the formula were not a secret, and if there were other formulas in existence just like it, or similar thereto, then its enhanced value as a secret formula would be exploded, and the grade of the offense would be reduced from *grand-larceny* to *petty-larceny*, with only a nominal punishment. It was upon this theory that the magistrate gave him great latitude in prying into all the details of the "Celery-Cola" formula, and in permitting him to ask all kinds of questions about other similar formulas. Of course, if Mayfield had admitted that he also had the "Koke" formula at that very time, and that it was similar in many respects to the "Celery-Cola" form-

ula, Allen would have immediately launched into a minute cross-examination as to all the details of that formula, under the guise of attempting to show that it was identically the same as the "Celery-Cola" formula, and Mrs. Brown's object would have been accomplished. Mayfield was just sharp enough to sense all this, and so, as he says, in referring to the answers he made to these questions (Rec., 2437):

"I evaded them along that line because they were immaterial and did not have any bearing on the case at issue. As before stated, my property was at stake, and that is why I answered those questions along there as I did."

Under the heading "Manufacture of Koke in Birmingham and Nashville," plaintiff has gotten up another "deadly parallel." In one column plaintiff quotes statements of Mayfield to the effect that the J. C. Mayfield Mfg. Co. bottled all his soda water flavors, including "Koke," in Birmingham, and that in Nashville the same company "manufactured" "Koke." In the other column is an excerpt from Mayfield's testimony in the "Rice Record" in which he made the statement that the J. C. Mayfield Mfg. Co. was doing nothing then but supplying the Celery-Cola Co. with the two specialties, "Celery-Cola" and "Pepsi-Nola," that it was not manufacturing anything at the time but "Celery-Cola," and that the Celery-Cola Co. was not manufacturing anything at the time except the two specialties referred to, although it did other business. In the "Rice Record" Mayfield was speaking specifically of the *corporation*

known as the J. C. Mayfield Mfg. Co., which was incorporated at Nashville, Tenn., and to which the "Celery-Cola" business, formula, and trade-mark had been duly and formally assigned in writing. He had never assigned the "Koke" business to that concern, but had always owned and conducted that business individually, up to the time of the organization of the Koke Company of America. It was so alleged in the answer (Rec., 40), and has been so stated by Mayfield all through his deposition. For instance,—

J. C. MAYFIELD (Rec., 1616):

"After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America."

And again (Rec., 2423):

"There appears in the 'Rice Record' the following questions and answers: 'Q.—Mr. Mayfield, what business is the J. C. Mayfield Co. engaged in? A.—They have contracts with the Celery-Cola Co. on their specialties. Q.—What specialties? A.—Celery-Cola and Pepsi-Nola.' Those were the only two things the J. C. Mayfield Mfg. Co. had just that time. I individually owned the 'Koke' formula. It was not owned by the J. C. Mayfield Mfg. Co., but by me as an individual."

And again (Rec., 2430-1):

"On pages 24 and 25 of that record appears these

questions and these answers: 'Q.—Mr. Mayfield, what does your company manufacture besides this 'Celery-Cola?' A.—That is all they do. Q.—Does this Celery Cola Co. manufacture anything except Celery Cola? A.—They do other business, but do not manufacture anything else except these two drinks.' The facts are that those two specialties is what they manufactured. The Celery-Cola Co. had a license from the Mayfield Mfg. Co. to manufacture those two specialties. \* \* \* They bought other extracts and manufactured other syrups, and they bought other things and sold them on the market. \* \* \* When I say the Celery-Cola Co. *manufactured* the 'Celery-Cola,' I mean they *mixed the syrup*."

Mayfield was president and principal owner of both the Mayfield Mfg. Co. and the Celery-Cola Co., and he manufactured his "Koke" in the same building which those companies occupied, and carried on his "Koke" business under the trade-name of whichever company's building he happened to be in at the time, and, naturally, in speaking loosely of the matter, he stated that one or the other of those companies manufactured or bottled his "Koke." But of course, in strictness, they did not do so, because they did not own the product or the business. Mayfield just took advantage of their facilities to manufacture and market "Koke."

For example (Rec., 1664):

"After I bought in with Mr. Schuyler in the vinegar business I bought out Ensley & Moody [who had been running the Celery-Cola Bottling Co. prior



thereto in Birmingham] \* \* \* I took over the vinegar business and took over the bottling business, and united them, under the name of J. C. Mayfield Mfg. Co."

Here it is apparent that he was conducting the vinegar business and the bottling business as an individual under the trade-name of J. C. Mayfield Mfg. Co., and that it was not the Nashville corporation to which he referred at all.

Then plaintiff tries to make out a contradiction by urging that, after Mayfield had stated that the various companies made the various products, he turned around and stated that *he* made all of them personally. Of course, the companies were mere legal entities and could not actually manufacture anything themselves. They had to act through some person as agent, and what Mayfield here stated was that he was that agent who actually did the manufacturing.

J. C. MAYFIELD (Rec., 2431) :

"I am asked to state whether at that time the Celery-Cola Co. made the Koke, or whether the J. C. Mayfield Mfg. Co. made it, or who did make it. \* \* \* I manufactured all the stuff,—not only 'Celery-Cola,' and 'Pepsi-Nola,' *and* (but) manufactured the 'Koke.' "

Under the heading, "Manufacture of Koke in St. Louis and Nashville," (Plaintiff's original brief, p. 87),

plaintiff displays some wonderful ingenuity. It quotes from Mayfield's testimony (Rec., 1595) as follows:

"I went to St. Louis to see if I could not organize a company there. It was a bottling company. \* \* \* Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making 'Celery-Cola' and 'Koke.' "

But where plaintiff has placed the eclipses, plaintiff has omitted the important statement, immediately following the phrase, "It was a bottling company," reading as follows: "and made arrangements to get the goods on the market, *but we did not succeed.*"

Evidently plaintiff was here building up a straw case to be demolished later. It referred to the testimony of Norville N. Leaver (Rec., 2035) and John H. Bohne (Rec., 2041) who were connected with the Celery-Cola Co. of St. Louis, in 1903 and 1904, which concern was operated by Jerome and Mrs. Brooks (Rec., 2445) and which no one pretends ever had any license to deal in "Koke," or ever in fact mixed any "Koke syrup, or handled it in any way), and then triumphantly asserted that, because these two parties never heard of "Koke" during their connection with that concern, therefore Mayfield is "successfully impeached." Plaintiff also "impeaches" Mayfield by the witness M. J. Handley (Rec., 1989), of Nashville, by stating that he was president of the Tennessee Carbonating Supply Co., that this concern had a contract with the J. C. Mayfield Mfg. Co. in Nashville to supply it with two of its products,—

"Celery-Cola" and "Pepsi-Nola,"—and that he never heard of the J. C. Mayfield Mfg. Co. ever selling any product under the name of "Koke." Handley says (Rec., 1990):

"I don't know whether or not the J. C. Mayfield Mfg. Co. was, as a matter of fact, manufacturing a number of different specialties, I couldn't say. We handled 'Celery-Cola,' 'Pepsin-Ola,' and very little 'Vig-O.' Of course, I don't pretend to say positively that the J. C. Mayfield Mfg. Co. was not manufacturing and selling a product by the name 'Koke;' I don't know what they were manufacturing. \* \* \* So far as I knew they may have been manufacturing a product called 'Koke.' \* \* \* Now I want to say another thing,—when we first began the business it was on Market St., and J. C. Mayfield had a laboratory in the rear of the building over there. Now, I noticed him ship the stuff out of there, but I never knew what it was,—put it up in barrels and shipped it away, and I never knew what it was,—put it up in barrels and shipped it away, and I never knew what it was. I couldn't say whether it was 'Koke' or not."

Plaintiff then called several witnesses in an effort to show that "Koke" was not manufactured in Birmingham. The main witness was W. M. Smith (Rec., 1893), and he set the pace for all the others. He said (Rec., 1899):

"I don't consider it dishonorable, or a sign of a lack of integrity, to deliberately falsify."

Evidently he believed in putting his convictions into practice (Rec., 1897) :

“Yes, sir, I beliberately told you a falsehood when you asked me the question, and I confess publicly before the court that I falsified on that occasion.”

This is the pitiful wretch who produced “the little slip with ‘Koke’ printed on it,” which plaintiff has taken the trouble to reproduce on page 93 of its brief, and who testified that Mayfield handed him this slip at the time of speaking to him with reference to being a witness in behalf of defendants in this case. He said on direct examination (Rec., 1894) :

“Yes, sir, on March 4th., or 5th., of this yeas, Mr. J. C. Mayfield, Sr., stopped me on 3rd. Avenue and 20th. St., Birmingham, and asked me to wait a minute. He called me off to one side and said, ‘We are having court up here at the Tutweiler Hotel. I want you to come up there. Maybe you can do me some good. We are bottling a drink called ‘Koke,’ and I know you have seen the stuff that we bottle. All you have to do is to go up there and tell them we have been bottling that stuff.’ He handed me a little slip with ‘Koke’ printed on it. After that he asked me what I was doing then, and I told him I was in the automobile business, but was not working just then. ‘Well,’ he said, ‘maybe after this case is over, perhaps I could give you a job in Louisiana in the bottling plant down there.’ He took down my address and gave me that little slip. This little slip marked Plaintiff’s Rebuttal Exhibit 66 is a slip just like the one that Mr. Mayfield handed me, but I

didn't notice about the number of it. I told Mr. Mayfield I didn't know whether I could go down there or not, but if I could do him any good I would like to if there was any possible chance; I didn't know whether I could or not."

On cross-examination he said (Rec., 1896-7):

"XQ.—Now I will ask you, Mr. Witness, if Mr. Mayfield didn't ask you if you remembered his naming 'Koke' in Birmingham in 1904, 1905, and 1906, and if you didn't make the statement, in the presence of Mr. J. C. Mayfield and W. F. Norman, that you did remember that he made 'Koke,' and if you didn't go on and describe the label with which the product was labeled? A.—Mr. Mayfield asked me to say that. XQ.—On the contrary, didn't Mr. Mayfield ask you whether or not he had made 'Koke'? A.—He asked me, yes, sir. XQ.—If you remembered his making 'Koke'? A.—He asked me did I remember it and I told him yes. XQ.—And you told him yes? A.—Yes. XQ.—And I now ask you whether or not you didn't come into this hotel then,—the 'Tutweiler Hotel,—in the presence of J. C. Mayfield and W. F. Norman and me,—A. B. Littleton,—and make the statement to me that you remembered his making 'Koke,' and labeling it 'Koke,' and that you washed his 'Koke' bottles, and that your recollection on that was clear, and if you didn't describe the 'Koke' label to me? A.—Yes, sir. XQ.—That statement you now say it untrue? A.—I didn't say it was untrue, I tell you I did say that. XQ.—You told me that was true, that you remembered that at that time? A.—Yes, sir. XQ.—Well, was it a fact, did you remember it, or did you not remember it? A.—I did remember it."

This creature's versatility in downright lying is truly amazing. On his direct examination he said, (Rec., 1894), "I told him [Mayfield] I was in the automobile business, but *was not working just then.*" On cross-examination he said (Rec., 1896): "No, sir, I was not dissatisfied *with the position I had.* I wanted to *change* and go to New Orleans *because I had kin people down there.*" On re-direct examination he said (Rec., 1898): "You say that if I have any statement to make as to why I made the statement, which I now say is false, to Mr. Littleton and the gentlemen he has named, I can go ahead and state it; well, I simply made the statement because *I was out of a position*, and I thought maybe there was a chance for me getting a position,—*I had tried to get a position in town and there wasn't a possible chance.*" On re-cross-examination he said (Rec., 1898-9): "You ask if I would sell my honor and my integrity for a mess of pottage; I don't know exactly whether I would or not. You ask if I didn't state to you on cross examination that I had a job here at the time, and that I was well satisfied with it; *I had a job*, but the job *wasn't paying me enough money.* You ask if I didn't just this minute tell Mr. Hirsch that *I was out of a job and looking for one*; yes, *I was out of a job.* \* \* \* You ask if I didn't just make the statement to you that *the job I had was entirely satisfactory*, and that *I had no reason for making a change* except the fact of *my kin people living in New Orleans*; you ask if I didn't just make that statement; *sure I did.* \* \* \* You ask if I now make the statement that the inducement which impelled me to sacrifice my honor and integrity and to come up here and deliberately



falsify, was to get down to New Orleans to my kin people,—if that's the price I was willing to pay for selling my honor and integrity; no, not exactly. I wasn't undertaking to sell my honor. \* \* \* You ask which, then, is the truth, the fact that I had a job or didn't have one; *I had a job* with the *Jitney Motor Car Co.* You ask which is the truth, that I was satisfied, or not satisfied, with the job; I wasn't satisfied with the money I was getting at my trade of automobile mechanic. The job was satisfactory, all except I wasn't getting enough salary. You ask which one of the statements is true, that I wanted to go to New Orleans *to be with my kin people*, or that I wanted to go there *on account of getting a better job*; I wanted to *get a better job*. You ask if I repeat the statement that I wanted to go to my kin people; I haven't seen them since I was a baby, and don't know anything about them. All I know is they are down there, and that's all. Yes, sir, I would like to go down there to see these people, who are utter strangers to me and who I have never seen in my life, and *that's* the impelling inducement that made me want to leave a fine city like Birmingham and go down to a place like New Orleans." (See J. C. Mayfield, Rec., 2450).

Will Barrow, a gentleman of color, is another hot specimen. He said (Rec., 1925-6):

"I started work for the *J. C. Mayfield Mfg. Co.* in 1906 or 1907, and worked there about a year and a half or two years. \* \* \* Yes, sir, I was working for the *Celery-Cola Bottling Co.* You say you thought I told Mr. Hirsch a moment ago that I was working

for the J. C. Mayfield Mfg. Co.; he was running the Celery-Cola Company on Morris Ave., *so they said*. I was working on Morris Ave. for the *Celery-Cola Co.* Yes, sir, I now say I was working for the *Celery-Cola Co.* at 2116 Morris Ave., and *not* for *J. C. Mayfield*. You ask if I mean to say I don't know the name of the company I was working for; yes, sir, I know it. You ask which one I was working for; I was working for the *J. C. Mayfield Mfg. Co.* You say, then, that I was not working for the Celery-Cola Co.; he was bottling it at the time I worked for him. You again ask which one of these companies I was with; I worked for the *J. C. Mayfield Mfg. Co.* on Morris Ave. \* \* \* You again ask which company I was working for; I was working for the *Celery-Cola Co.*, I suppose. You say that just a minute ago I said I was working for the *J. C. Mayfield Mfg. Co.*; *that's where I was working at.*"

There is no telling where this vagabond did work,—whether for the J. C. Mayfield Mfg. Co., or the Celery-Cola Co., or the Celery-Cola Bottling Co., or for J. C. Mayfield individually. He says he started as bottle washer,—at whichever plant it was,—and later got a job bottling (Rec., 1926). He says, "He was making a lot of drinks there." (Rec., 1927). He says that, besides the soda water, they handled "Hope-Ale," some bitters, and cider and vinegar. (1927). He admits he don't know the brands they put on the cider, or what was on the labels. "I can't remember about them at all," he says. (1927). He can't remember the different brands labeled on the vinegar. As to the soda waters, he says all he can remember are strawberry, lemon, orange phosphate, "Celery-Cola," and "Pepsin-Ola," (1928),

and adds, "I won't say but there was others, but these is what I can remember. There may have been others. That's been a long time ago, and there may have been others that I can't now remember the names of,—yes, sir, that's right, there may have been others." (1928). He admits he can't read or write (1927). He admits that he didn't handle any of the barrel stuff that went out, and that he doesn't know what labels were put on the syrup barrels (Rec., 1930).

S. A. Ellis is another typical witness in this group. He says (Rec., 1843):

"I was connected with J. C. Mayfield, Sr., in the soft drink business in 1902, I believe it was. \* \* \* He was manufacturing drinks of different kinds, I couldn't name all that he handled, I don't know. The concern was called the Celery-Cola Co. You ask what was the name of the syrup he was manufacturing; well, I don't know that he said. He was manufacturing 'Celery-Cola,' syrup, or Cola syrup, I think that was what they called it. \* \* \* 'Celery-Cola' was the principal thing that was being delivered from the wagons. He also had some other drinks, soft drinks of different kinds,—different flavors, you know. I don't recall to mind now the names of any of the others besides 'Celery-Cola.' "

This witness is in a fine position to prove that "Koke" was not manufactured and sold in Birmingham by some one of the various companies in which Mayfield was interested, during his connection with the Celery-Cola Co. ! And he is typical.

L. M. Barclift is another of the same stripe. He says he entered the employ of the J. C. Mayfield Mfg. Co., in 1902 (Rec., 1844), but that he had previously been employed by the O. L. Gregory Vinegar Co. and the Schuyler Vinegar Co., which Mayfield later bought out (1844), and that "I was a vinegar salesman primarily." \* \* \* I had a trade in vinegar and cider, and I was sent out on the road primarily to sell vinegar and cider, that was my business. If I handled any soft drinks at that time, my main idea was to sell vinegar and cider." (Rec., 1846). It is not apparent just why a vinegar salesman, who spent all his time on the road selling vinegar and cider, should be called to advise the court as to what different soda water brands and flavors were being manufactured and sold in Birmingham by J. C. Mayfield. That this man is another willful perjurer is plain. He says (Rec., 1848):

"Before I came and sat in this chair, I had not talked to any one on this subject,—on this question,—on this case, about what I have been testifying here. No, sir, I have not repeated to anyone, either wholly or in substance, what I have said in this room, nor any part of it. \* \* \* Mr. Bodeker and I were walking up the street, and we talked about several different things,—about Mr. Patton, an officer who used to be here, a friend of mine, getting shot and died. Anything else I talked about had nothing to do with this present matter, except that Mr. Bodeker brought me up here and introduce me."

Then he turned around and admitted (Rec., 1850) that sixty days before that he had received a long distance telephone call in Chattanooga from George H.

Bodeker asking him to come to Birmingham; that he went to Birmingham in response to the call; and that he went to Bodeker's office in the Brown-Marx Building, in Birmingham, and dictated to Bodeker's stenographer a full and complete statement "in regard to this business,—practically the same as you have been asking this morning." He first said that when "she took my statement down, *I don't think there was anyone present but the stenographer, but Mr. Bodeker came in later.*" Then he turned around and admitted that "I believe *Mr. Bodeker asked me the questions in front of the young lady.* You say that I said I made a statement first, and Mr. Bodeker came in later, and you ask if that is what I mean to say; I mean to say that I was there,—*he was there when the young lady took it down,* and then she wrote it off, and I signed it after he left,—he asked me the questions and she took them down in short-hand, and wrote it down and handed it to me and signed it. Mr. Bodeker had gone." (1850). This statement which the witness says he dictated to Bodeker's stenographer is in evidence as Plaintiff's Rebuttal Exhibit 2 (Rec., 1853). In regard to this statement, Barclift was asked: (Rec., 1854):

"You ask, if there is any difference between my testimony and my signed statement, which you shall accept as true; bring me up again,—give me a new chance. Well, what I have testified to here is the truth, as far as I know. There might be a difference in the questions asked me here and in the statement." (Rec., 1854).

DAVID EARLE MOODY (Rec., 1883-5):

"The principal territory I travelled was within a radius of 100 miles of Birmingham. \* \* \* I was constantly on the road during that time. \* \* \* I made a specialty of 'Hope-Ale,' and sold more of that than anything. \* \* \* I had nothing to do with the manufacture of any of these specialties which either the Mayfield Mfg. Co. or the Celery-Cola Co. were getting out. I was merely a salesman, and had nothing to do with the laboratory end of it. I passed through the laboratory occasionally, but not often. I don't know of my own knowledge all the things that were made there, and I don't pretend to testify positively as to everything that was made there. I only know the things given me to sell, and if they made anything else there, any other product under any other name, if it didn't happen to be given to me to sell, why, of course, I didn't know about that."

(B. U. HOPPER, when asked if Mr. Mayfield made any extract or syrup called "Koke," replied (Rec., 1892) :

"It has been so long ago that I don't remember. Of course, he could have made it, and I couldn't say that he didn't make it. \* \* \* He was making a number of these extracts, but 'Celery-Cola' was the thing he was pushing. However, along with that he was making a lot of little extracts and syrups and there was quite a number of them. I couldn't say that I could name them all, at all."

J. T. ENSLEY (Rec., 1904) :

"Yes, sir, he was making a number of extracts, and I don't pretend to remember all the extracts he was making,—I couldn't call all the names. \* \* \* It



is possible he could have made it ['Koke'] without my knowing about it."

Thomas Dixon is a negro. He admits that "I don't know the number of different brands of cola drinks Mr. Mayfield was making and selling at the time. I can't remember whether he was selling two or three or not, because there were different soda wates, you know." (Rec., 1910).

He says he worked for the Mayfield Mfg. Co. about 1902 or 1903 (Rec., 1907), and that "I was the boss of the negroes, and would be after all the negroes who handled the vinegar. I certainly did see that they put the proper labels on it, but I can't remember the name of a single brand of vinegar he put out." (Rec., 1908).

GEORGE E. ANDERSON (colored), says that he worked for the J. C. Mayfield Mfg. Co. from 1902 to 1905, and that during all that time Dixon "was not a superintendent of the colored people there at all." (1918). He says that during the whole of that period Dixon was the drayman (1918).

HOMER BREWER is a negro employe of the Coca-Cola Bottling Co. in Birmingham. He says (Rec., 1912):

"I haven't been talking to anybody about my testimony in this case. No, sir, I never breathed it to a living soul before I entered this room just now. Nobody on earth knew what I was going to testify to until I came into this room and took that chair. No, sir, Mr. Bodeker over there never did see me about it, nor did Mr. Pierce. Nobody at the Coca-Cola

bottling plant ever talked to me about my testimony. Yes, sir, I was in the other room just now. You ask if Mr. Pierce was in there, too; I don't know Mr. Pierce. No, sir, I was not talking about my testimony in this case in the other room. I don't know, sir, how they knew what I knew about it. You ask if they just dreamed it; I don't know, sir, how they knew about it."

He says he worked for the Celery-Cola Co. at one time. "That's all I did around there, just washed bottles, and I don't know anything else that was going on there at all except the bottles I would wash." (Rec., 1913).

TOM ANDERSON, another negro, admits that he only worked for Mr. Mayfield for three or four weeks, when his pay was cut, and thereupon he got a job with the Celery-Cola Bottling Co., (Rec., 1914) which was then owned and operated by Ensley & Moody (Rec., 1917), and which nobody pretends ever bottled "Koke." He also says that Dixon was the drayman and not the negro boss (Rec., 1916).

MACK CRAWFORD, still another negro, was also a drayman. He says (Rec., 1921): "I didn't hault anything but 'Celery-Cola' as I know of. I didn't know no other name but 'Celery-Cola,' that's the only name I know of." (Rec., 1921).

WALTER THOMAS, still another negro, was another one of the draymen. He says (Rec., 1922):

"That's all I ever hauled, 'Pepsin-Ola' and 'Celery-Cola.' I never hauled any of the other products that they made, that's all I know of."

W. J. GARRETT, (Rec., 1985):

"Oh, yes, it is quite possible that he might have made a product 'Koke' and sold it as such. They made a good many different things back there, and he was always a great hand to be experimenting all along."

Finally C. J. Pogue is brought forth in the disguise of an ardent adherent of defendants, forced to take the stand against his will, and confessing with the greatest reluctance the awful wickedness of defendants.

But plaintiff's chief detective, H. B. Pierce, in an unguarded moment, thoroughly exposed this transparent pose. (Rec., 2100-1):

"Bodeker and his detective agency were employed in this case about March 5th., when we were in Birmingham taking the defendants' testimony. Mr. Bodeker was in the room during the taking of defendants' testimony, and that is the time when he was employed. \* \* \* Bodeker was employed in this case to help locate the former employes in Birmingham of the Celery-Cola Co. between the years 1901 and 1910. \* \* \* I couldn't tell you how long C. J. Pogue was assisting Mr. Bodeker. \* \* \* I do not know how much C. J. Pogue was paid for his services in this case on behalf of the Coca-Cola Co. \*\*\* I don't know how many times Bodeker had seen Pogue before he was examined in this case. I don't

know what information Pogue gave Bodeker other than the statement he made to him. Bodeker secured a statement from Pogue before the latter went on the stand. Just what that statement was I don't know. \* \* \* I understand that statement was given sometime between March and June."

Thus it is seen that, while Pogue was pretending to be assisting defendants in locating the former employes of Mayfield's various Birmingham companies, he was all the time in the pay of the Coca-Cola Co.,—playing a double game,—and, instead of honestly trying to locate these former employes for defendants, he was doing his best to keep defendants from finding them, and at the same time carroling them for plaintiff. This accounts for the difficulty defendants had in rounding up Mayfield's former employes, and the facility with which plaintiff got hold of them.

The little play Pogue made about not wishing to turn over to plaintiff the packages of letters and documents which he pretended he was compelled to produce in response to a *subpoena duces tecum*, was easy to see through. Pierce admitted that Pogue was in Bodeker's pay, and doing all in his power to assist Bodeker in getting evidence to use against defendants, and it is a safe bet that Bodeker, or plaintiff's counsel, or someone with enough discretion, carefully went through the papers Pogue had before the *subpoena duces tecum* was ever issued, and saw to it that Pogue would not produce any papers that might prove of benefit to the defendants. Under the circumstances, therefore, there is nothing at

all remarkable in the fact that in none of the letters, papers, or documents produced by Pogue did the name "Koke" appear. Plaintiff was too smart to make a slip of that kind. If Pogue had really been acting in the interest of defendants instead of plaintiff, he would have informed Mayfield that he had all these old letters and files at the time defendants were taking their testimony, because he knew defendants were moving heaven and earth to find some of their old "Koke" labels, letter-heads, price-lists, advertisements, etc.

J. C. MAYFIELD (Rec., 2450) :

"Pogue did not mention to me, nor did he intimate to anyone in my presence, that he had these letters which he has produced, or any documents of any kind or character referring to the 'Koke' business, or the 'Celery-Cola' business, or any business in which I was engaged."

But he told the Coca-Cola people that he had them, otherwise they never would have known it, and that explains why it was that defendants could not produce any of these papers, while plaintiff had no difficulty whatever in doing so.

Pogue's refusal to answer the question as to whether or not Mayfield manufactured "Koke" in Birmingham, is so manifestly a by-play that it is ludicrous. Pogue knew perfectly well that defendants knew he knew that Mayfield made and sold "Koke" in Birmingham, and that if he denied knowledge of the fact, he would be prosecuted for perjury, and no doubt convicted, so he

could not afford to answer straight out as plaintiff wished him to; but he made the little by-play referred to in order to convey the impression that if he had answered, his answer would have been detrimental to the defendants, thus seeking to accomplish the same result without any of the attending risk.

Another instance of this kind, showing what an infernal scamp Pogue is, is this (Rec., 1857):

"I was in Birmingham at the time of the trial of the case of *The State v. Melville Rice*. \* \* \* I had a colored fellow I always called 'Dick,' whose name I have been told is James Dixon. I understood that he was arrested about the time of the trial of the case of *The State v. Melville Rice*. I found him in jail, and I suppose he was arrested. You ask if, as a matter of fact, I found at his house certain material that came from the Celery-Cola, or the J. C. Mayfield Mfg. Co.; I think Mr. Bodeker found some things in his house which I identified as the property of this company. You ask if I placed those things in his home; well, I object, I refuse to answer that question. I refuse to answer it on the ground,—I refuse to answer it on the ground of *incriminating myself*."

On pages 95 and 96 of plaintiff's brief are quoted extracts from Mayfield's testimony in the Rice case to the effect that the first formula he wrote was the "Celery-Cola" formula, which was eighteen years ago. Mayfield was asked concerning this statement, and replied (Rec., 2427):



“You ask what the facts are with reference to the formula for Celery-Cola and the formula for Koke,—which was the first formula; Koke was the first formula. In response to the question asked me in the Rice Record, if the Celery-Cola formula was the first one that I made, I replied thereto, ‘Yes, sir,’ because the Celery-Cola formula was the first formula that Dr. Pemberton and I made,—later that I really felt that I made myself. Now I believe I can claim that I made the Celery-Cola formula myself. I do not claim to have made the Koke formula. I had absolutely nothing to do with that. Dr. Pemberton made that,—that is what I bought out.”

On pages 109, 110, and 111 of plaintiff's brief appear reproductions of some letters, and the inference is attempted to be drawn,—for what purpose is not apparent,—that “Celery-Cola” at that time had nux vomica, or strychnine, in it. Mr. Mayfield testifies concerning these letters on pages 2440-6 of the record, and completely removes any foundation for the inferences sought to be drawn.

## SCHEDULE III.

### The Color and Taste of the Drink.

#### Caramel Coloring.

#### (a).—Testimony of Defendants' Witnesses.

J. A. BERMUDEZ, a chemist, New Orleans. (Rec., 1496):

"I have known of caramel coloring ever since I have been in the drug business,—since about 1876 or '77. I was with,—in 1876 or '77,—P. L. Quisacks, 37 Royal Street, who used caramel coloring at that time for all soda fountain syrups. Mostly all soda fountain syrups are colored with caramel,—take sarsaparilla, vanilla, banana."

DAMA DIEHL, who has bottled soft drinks for 47 years and who now manufactures "Star-Cola," Nashville. (Rec., 1088):

"Caramel coloring is the least injurious, that is the reason we use caramel coloring. It is sugar."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville. (Rec., 1091-2):

"We color our drink with caramel. It is cheaper than anything else and it is permitted under the law under all of the states without having to put 'Artificially colored.' It is not a delterious coloring at all, and it makes a beautiful red colored drink \* \* \*. I do not know of anything else that would take the

place of caramel coloring. My chemist that I had with me for several years never used anything else.

LEE HAGAN, manufacturer of "Ko-Nut" and Afri-Cola," Atlanta. (Rec., 1292):

"I color our drink with caramel coloring. Caramel is cheapest. \* \* \* It is of vegetable origin and stands the acids better than anything we can get."

### **(b).—Admissions of Plaintiff's Witnesses.**

DR. JOHN A. WESENER, Chicago. (Rec., 926):

"Caramel has been in use as a coloring matter for beverages, oh, for a long time, a great many years. I should say it was used prior to the Civil War. Yes, it is now a universal coloring matter which is used extensively for coloring all kinds of drinks. It is one of the oldest coloring matters on the market and is perfectly harmless."

DR. WILLIAM P. HEATH, of the Pratt Laboratory, Atlanta. (Rec., 417):

"Caramel coloring has been in use a long time. It has been in universal use for coloring all kinds of beverages,—not only soda water drinks, but whiskeys, wines and beer and flavoring extracts as long as I can remember. \* \* \* It is the most universally used coloring among the food products. \* \* \* It is absolutely harmless as a coloring matter."

DAVE S. BAUER, a retail druggist, Mobile. (Rec., 544):

"Caramel is recognized as a standard brown coloring matter for syrups, and is in universal use, and was in such use when I was a boy. I am 42 years old and caramel has been used as a coloring for syrups ever since I can remember by every druggist I have come in contact with."

F. M. GREEN, a retail druggist, Atlanta. (Rec., 454):

"Caramel was used at that time (188 and prior thereto) almost universally as a coloring matter for drinks that we wanted to color a brown color. That is the only thing they could color them with and get by with it. I mean by that that caramel would not make a muddy precipitate and things of that kind. Other coloring matter would make a muddy precipitate."

I. L. James, a retail druggist, Atlanta. (Rec., 461):

"I have made root beer myself. \* \* \* We colored it with burnt sugar,—caramel. That material has been in universal use for coloring beverages, and we have used it to color vanilla flavoring."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 379):

"Yes, I think I did handle burnt sugar or caramel coloring. Now, I made many a batch of caramel coloring. In those days [prior to 1886] it was used in the drug business. \* \* \* Yes, I said caramel is a standard coloring matter."

## 2

## **Soda Fountain Beverages Same Color as Coca-Cola That Preceded It In the Market.**

### **(a).—Testimony of Defendants' Witnesses.**

ADAM DIEHL, who has bottled soda water for 47 years and who now manufactures "Star-Cola," Nashville (Rec., 1082-3):

"We have been bottling soda water for 47 years. \* \* \* We have been putting out those two drinks,—sarsaparilla and root beer,—for 47 years and both have been the same color all that time. \* \* \* The color of these drinks is a caramel color,—the same color as 'Coca-Cola.' We color those drinks with burnt sugar coloring,—caramel coloring."

J. A. BERMUDEZ, a chemist, New Orleans (Rec., 1496):

"Quisacks get out a preparation which is sold through the fountain as 'Mead.' That is put out by McClasky. That has been on the market here a long time prior to 1877. \* \* \* It is colored with caramel. It cannot be colored with anything else because at that time aniline dies were not known."

PATRICK J. GILLIAN, President of the Crescent City Seltz & Mineral Water Co., New Orleans (Rec., 1501-2):

"The name of our concern is the Crescent City

Seltz & Mineral Water Co. I have been connected with that concern since '76. \* \* \* I know that all the time in the Crescent City Seltz & Mineral Water Co. we bottled sarsaparilla. \* \* \* We colored sarsaparilla with sugar coloring,—caramel coloring. Sarsaparilla coloring should be the same color all the time. \* \* \* It is supposed to be always the same color. I have seen Coca-Cola. It is pretty much the same [color] as the sarsaparilla we made. I have heard that they made sarparailla in 1847,—that was the first factory that was put up here,—but I wasn't in the business at that time. Some of the other beverages that have been colored with caramel coloring since 1868,—well, most any of the colored drinks, they are colored with it, I think."

TOM COLLINS, bartender, Chattanooga Rec., 988):

"I have known the drinks root beer and sarparilla ever since I have been in Chattanooga,—about 28 years. The color of sarparilla and root beer is about the same as Coca-Cola."

JOE QUINN, bartender, Chattanooga (Rec., pp. 991-2):

"I am 40 years old. \* \* \* I have handled root beer and sarparilla. I have known these two drinks all my life. \* \* \* They all have that dark color, I should say between a brownish and black color. I could not distinguish a glass of Coca-Cola from a glass of root beer by the color."

E. W. FREEMAN, bartender, Chattanooga (Rec., 975-978):



"I also handle in my place of business sarsaparilla and root beer. \* \* \* I have known those drinks for years (Rec., 975). \* \* \* I have heard of and handled root beer and sarparilla all the time I have heard of and handled Coca-Cola. I knew of those two drinks, sarsaparilla and root beer, before I ever heard of Coca-Cola. They were the same color at that time as now. (Rec., 978).

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 999):

"Root beer has been on the market a great many years."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004):

"I have handled sarparilla and root beer,—how long I cannot tell,—it has been a great many years, though, sarsaparilla. The color of these drinks compared with the color of Coca-Cola,—I guess about the same color."

### **(b).—Admissions of Plaintiff's Witnesses.**

C. G. PETERS, a retail druggist for 28 years, New Orleans (Rec., 655):

"I have handled a lot of these drinks like root beer and sarsaparilla. The coloring matter in root beer is burnt sugar,—what we call caramel. The coloring of sarsaparilla, and root beer, and Coca-Cola, is very much alike. There is no distinction to the ordinary eye. I have been handling sarsaparilla

and root beer for 28 years. I was handling it before I ever handled Coca-Cola,—before I ever heard of Coca-Cola.”

DAVE S. BAUER, a retail druggist, Mobile (Rec., 543-4):

“I have been in the drug business 24 or 25 years, during which time I have been dispensing at my soda fountain root beer and sarsaparilla and drinks of that kind. Sarsaparilla has been on the market to my knowledge since I have been in the drug business and longer,—as long as the Pharmacopœia has been in existence. I should say it has been in existence 50 years, if not longer. The color of the soda fountain sarsaparilla syrup during this time has varied according to the strength used by each particular dealer,—I might make my sarsaparilla syrup thicker than anybody else’s and mine of course would have a darker color; however, it has all had the same general color, which is brown. I have made sarsaparilla syrup myself, and I have colored it with burnt sugar or caramel coloring. Since I have known sarsaparilla syrup as a soda fountain beverage it has been colored with caramel coloring. Yes, I have also handled root beer for the same number of years. It has been known longer than I have been in business. It has always had that same dark brown color. \* \* \* In general color they [Coca-Cola and sarsaparilla] are alike,—as a matter of fact both have a dark brown color, and so has root beer.”

I. L. JAMES, a retail druggist, Atlanta (Rec., 461-2):

"You ask what other drinks are on the market similar to Coca-Cola in color; well, root beer resembles Coca-Cola in color,—foams a little more,—and sarsaparilla; of course, sarsaparilla and root beer are similar. \* \* \* I do not know what is the difference in color between a glass of root beer and sarsaparilla as served at a soda fountain and a glass of Coca-Cola. Coca-Cola might be a shade lighter, I don't know. It is very hard to tell the difference. I don't think the ordinary customer coming in, if he saw a glass of one and a glass of the other sitting on the counter could tell the difference between them."

F. M. GREEN, a retail druggist for 22 years, Atlanta (Rec., 453-4):

"Root beer and sarsaparilla are colored with caramel. I remember seeing sarsaparilla on the fountain ever since I was a small boy. I am now 42 years of age. I have seen it since I was 10 years old any way,—that is to say, I have seen it on the market for 32 years and it has been substantially the same color during all of that time that it is today. \* \* \* I have made sarsaparilla and root beer myself way back there years ago and I used caramel to color it. \* \* \* I have seen 'Moxie' and that is a deep brown color. \* \* \* It is along the same kind of color [as Coca-Cola]. \* \* \* I have seen 'Moxie' on the market [since] about 1888."

W. L. SAMS, one of plaintiff's traveling salesmen (Rec., 337):

"I have seen root beer when I was 10 years old that had the same color it has today. \* \* \* I have seen sarsaparilla during the time I have been in business of the same color it is today. Yes, I have seen 'Moxie' and it is similar in color to root beer and sarsaparilla."

ALEXANDER CRUICKSHANK, proprietor of cigar store and soda fountain, Atlanta (Rec., 465):

"'Moxie' is a soda fountain beverage."

F. C. PEACE, one of plaintiff's detectives, says he has seen "Moxie" and that it is similar in color to "Coca-Cola." (Rec., 2205-6).

DR. JOHN A. WESENER, a chemist, Chicago (Rec., 926):

"Yes, I think that root beer, sarsaparilla, and 'Moxie' and drinks of that character, were on the market and sold prior to 1886. I could not say whether they were colored with caramel at that time, because I never made any tests at that time, but caramel could have produced the color that they had."

WILLIS E. VENABLE, former manufacturer of "Coca-Cola," and a soda fountain proprietor since 1867 (Rec., 590-1):

"I sold root beer at that time [1887], certainly, —vanilla, lemon, strawberry, sarsaparilla, and probably 50 other different drinks that somebody got out. I cannot remember whether I had been selling this

root beer, and sarsaparilla, and such things, before I heard of Coca-Cola. I don't think I had ever sold any root beer before that, but I sold sarsaparilla. I don't remember whether sarsaparilla was at that time about the same color it is now. I suppose it was,—that is all made about the same color, I think, about, as well as I remember."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 378-9):

"You ask if in my drug business from '84 to '87 I handled any other beverages; \* \* \* we sold liquor and I do not know really what we did sell. \* \* \* We had a syrup called sarsaparilla and put it in the soda fountain. \* \* \* I don't remember that we made it, we may have,—anybody made it so far as I know, sarsaparilla syrup. \* \* \* The color of that sarsaparilla syrup was brown, I think,—yes, I think it was a dark reddish brown."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358) and for 22 years its Secretary (Rec., 353), when asked if there were any other soda fountain beverages of the same color as Coca-Cola at and prior to the time Coca-Cola was first introduced, replied, "I expect there was." (Rec., 361).

In *Chas. E. Hires Co. v. Consumers Co.*, 100 Fed., 809 (C. C. A.-7) it was said that the predecessors of the Chas. E. Hires Company began to make what has since become known as "Hires' Root Beer," in 1877.

In *Moxie Nerve Food Co. v. Maddox*, 152 Fed., 494, it was said that "Moxie" was first placed in the market early in 1885 and that it was a beverage "resembling in color the usual extract of vanilla."

## SCHEDULE IV.

DEFENDANTS AND THEIR PREDECESSORS HAVE MADE AND SOLD SOFT DRINKS EXACTLY LIKE PLAINTIFF'S IN COLOR, TASTE, AND EVERYTHING ELSE, SINCE 1888.

### (a).—The cola drink known as "Koke."

A. O. MURPHY, of Barnesville, Ga., says that, when the Pemberton Medicine Co. was formed on January 14th, 1888 (Rec., 1287; *defendants' exhibit 22*), Dr. Pemberton conveyed to it the "Coca-Cola" formula and business (Rec., 1280 and that thereafter the partnership manufactured and sold "Coca-Cola" (Rec., 1282). He says:

"The color of that syrup was identical with the color of 'Coca-Cola' syrup today, and about the same in taste. \* \* \* The color and taste of that product we were manufacturing then under the name of 'Coca-Cola' was the same, as far as I can see, as that now manufactured by the Koke Company and called 'Koke.'" (Rec., 1282).

Later they changed the name of their "Coca-Cola" to "Yum-Yum," but the product itself remained the same. (Rec., 1283).

T. C. BANKS, of Newman, Ga., but formerly of Atlanta, the brother-in-law of E. H. Bloodworth, deceased, at whose home Bloodworth lived while in Atlanta (Rec., 408-9), says that the "Coca-Cola" which the Pemberton Medicine Co. manufactured and sold in 1888 "was a dark mahogany. \* \* \* It tasted like the 'Coca-Cola'



you get now,—practically the same taste (Rec., 1409). He says that later, after the Pemberton Medicine Co. changed the name of its product from "Coca-Cola" to "Koke," the product itself remained the same. "If there was any difference between this preparation they called 'Koke' and the preparation called 'Coca-Cola,' I could not tell it from drinking it and looking at it. It appeared to be the same. It was supposed to be practically the same product, I think, under a different name." (Rec., 1410).

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased, says, in speaking of the Pemberton Medicine Co., in which her father was a partner (Rec., 1262):

"I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now and it looked like 'Coca-Cola' (Rec., 1262-3). \* \* \* They made this 'Coca-Cola' three or four months, then they still made it and called it 'Koke.' (Rec., 1263). \* \* \* My father and Mr. Mayfield continued, after Mr. Murphy sold out, for several years,—I think it was four or five or six years. All that time they continued to manufacture and sell this product 'Koke.' " (Rec., 1267).

J. C. MAYFIELD says that, after Pemberton transferred the "Coca-Cola" business to the Pemberton Medicine Co. in January, 1888 (Rec., 1607), "we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months." (Rec., 1610). Then

they changed the name to "Koke." (Rec., 1612-13). "The product was no different from the product 'Coca-Cola,'—there was no difference between the product which we thereafter labeled 'Koke,' and 'Coca-Cola.' We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula." (Rec., 1614).

It is admitted by plaintiff's officers that Mayfield, Murphy, Bloodworth and Pemberton, forming the Pemberton Medicine Co., manufactured and sold a cola beverage in 1888 which had the same color and taste as "Coca-Cola."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 382):

"After this transfer April 14th, 1888 \* \* \* they \* \* \* operated the Pemberton Medicine Co.,—that is it, yes. That company's business was manufacturing 'Wine of Coca,' and they undertook to manufacture,—it was a hair dye, and they had 'Globe Flower Cough Syrup' and 'Compound Stillingia,' and shortly after I bought 'Coca-Cola' they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company,—and called it 'Yum-Yum.' \* \* \* I am not certain whether that was manufactured by the Pemberton Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. \* \* \* I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that is right, they were running the Pemberton Medicine Co. \* \* \*

These people,—Mayfield, Bloodworth and Murphy,—were running the Pemberton Medicine Co. for awhile,—I don't think they ran it long,—and they were manufacturing a drink similar to 'Coca-Cola' at that time. (Rec., 383).

F. M. ROBINSON, a stockholder and director of the Coca-Cola Co. and formerly Secretary thereof (Rec., 359-360, 364-5):

"As to the associates who Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them and Mr. Bloodworth was another one,—I don't just remember his name now,—Murphy, I guess it was (Rec., 360). \* \* \* They did a medicine and 'extract business. They manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks,—colas,—to some extent. (Rec., 359) \* \* \* The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. \* \* \* I don't know anything about the quantities they manufactured or sold, but I know just as well as I know that Hagan & Dodd manufacture 'Ko-Nut,' but I don't know anything about the extent of it."

J. C. MAYFIELD:

"After the retirement of Murphy in June, 1888 (*defendants' exhibit 22*) and the death of Dr. Pemberton that same summer, Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895. \* \* \* Then I bought out Mr. Bloodworth (Rec., 1615). \* \* \* After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke

Co. of America," (Rec., 1616) whereupon I sold the Koke Co. of America all my interest in the 'Koke' business. \* \* \* The Koke Co. of America has continuously owned the 'Koke' business from its organization down to date. (Rec., 1617). \* \* \* This product 'Koke' has always been the same color from the time we began to make it up to the present time, and had the same taste substantially." (Rec., 1628).

L. A. HOLLEY, formerly of Roanoke, Ala., but now of Atlanta, Ga., visited J. C. Mayfield at his place of business in Atlanta in 1895 or '96 (Rec., 1274). He says:

"He was manufacturing some drinks at that time. I drank some of it. \* \* \* It tasted something like 'Coca-Cola' and it seemed something about the same color as 'Coca-Cola,'—a kind of dark brown color." (Rec., 1275).

H. C. GROVES, a retail druggist for 30 years, Ocala, Fla. (Rec., 1212-13):

"I know J. C. Mayfield. I knew him when I was manager of the store in the spring of '88. I first met him at my store in Ocala, Florida. \* \* \* He was soliciting for cola drinks at that time, trying to sell me cola drinks. The name of that drink was 'Koke,'—'K-o-k-e.' \* \* \* The color of that syrup was a dark brownish. I have seen 'Coca-Cola' syrup. I judge they are just the same,—this 'Koke' and 'Coca-Cola.' I made a drink of it and drank it. \* \* \* It tasted something very similar to the taste of 'Coca-Cola.' I bought some of it at that time. \* \* \* He sent me more after that and I have continued to handle it up to today,—continuously from that time up to today." (Rec., 1213).

GEORGE R. EDMONDSON, proprietor of two drug stores, Atlanta (Rec., 1299):

"I know J. C. Mayfield. I first met him, I guess, in '98 or 1900,—it has been quite a long time ago. When I first met Mr. Mayfield he was here engaged in the manufacture of a soda fountain extract. We bought some extract from him; we bought some of it, I guess, from time to time five or eight months before he left Atlanta, and he went from Atlanta to Birmingham and we got some after he left Atlanta. It was very similar to 'Coca-Cola' in color; we served it like 'Coca-Cola' in seven ounce glasses."

P. B. MCGRAW, a soda water bottler, Gadsden, Ala. (Rec., 1313-14):

"I have been bottling 'Koke' ever since 1900. I purchased it as an extract from J. C. Mayfield right here in Birmingham. \* \* \* Sarsaparilla and 'Koke' are very near the same color."

R. J. BAKER, in the advertising business in Birmingham (Rec., 1302):

"Mayfield, in 1902, when I knew him, was bottling 'Koke' over there in his place of business at 2116 Morris Avenue. I knew him in a business way a good many years. \* \* \* I used to have to go to his place of business to collect on Saturdays, \* \* \* and he would give me a drink of this 'Koke.' It was \* \* \* a syrup just like 'Coca-Cola,'—red like it, tasted like it."

A. S. JOSEPH, of the Alabama Brewing Co., Birmingham (Rec., 1330):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks and ship-

ping 'Hop Ale' then. \* \* \* Owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of a hundred packages of 'Hop Ale,' delivering it and later collecting on it,—which brought me to his place of business sometimes twice a day for a week. \* \* \* I remember he was manufacturing 'Celery-Cola' and 'Koke.' This 'Koke' was a soft drink. It was about the color of all soft drinks,—it seems to me the appearance was about on a par with 'Coca-Cola' and those cola preparations."

E. D. MONTGOMERY, formerly shipping clerk for J. C. Mayfield, Birmingham (Rec., 1356-7, 1363):

"I know J. C. Mayfield. \* \* \* I was with him in 1908 in business, in his employ in 1908. \* \* \* He was making several different drinks. \* \* \* 'Celery-Cola,' 'Pepsi-Nola' \* \* \* 'Creme' and 'Koke.' \* \* \* This stuff 'Koke' that was made down here where I was working for Mr. Mayfield looked like 'Coca-Cola' and tasted like 'Coca-Cola.'"

W. F. BOYLIN, Nashville, who has printed "Koke" labels for J. C. Mayfield since about 1903, says (Rec., 1073-4):

"This 'Koke' was a cola syrup, a cola drink. \* \* \* I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that didn't have the same general taste."

W. M. SIDEBOTTOM, manager of Skalowskie's, Nashville, and who has been in the retail soda water business for 30 years or more (Rec., 1162):

"I knew J. C. Mayfield fifteen or eighteen years ago at Nashville and at St. Louis. He was en-



gaged in manufacturing soda fountain syrups. Among other syrups he was manufacturing was 'Koke.' The taste of this drink from the beverage he was making was similar to all cola drinks. \* \* \* 'The 'Koke' was 'Koke'—a regular cola taste. The color \* \* \* was dark, very much the same as 'Coca-Cola.' " (Rec., 1262-3).

J. B. FREED, soda fountain proprietor and confectioner for 14 years, Nashville (Rec., 1172):

"I knew J. C. Mayfield about 13 years ago,—first met him in Nashville. \* \* \* He was engaged in manufacturing syrups,—'Celery-Cola' and 'Koke.' We bought from him continuously since I began about 13 years ago. \* \* \* This syrup ['Koke'] has always tasted about the same to me all the time,—I could not see any difference in it. It is somewhere near 'Coca-Cola.' \* \* \* The color of the drink made from this [syrup] is the same thing,—it has always been the same color and similar taste. We are still handling that product, and 'Coca-Cola,' too, and always have during the past 13 years,—have never been without them."

### **(b).—The cola beverage known as "Celery-Cola."**

It is admitted (Plaintiff's brief, pp. 60, 61) that J. C. Mayfield and his successors have continuously manufactured and sold "Celery-Cola" since 1893. Plaintiff says in its brief (p. 60), "In 1893 he put upon the market a drink which was called 'Celery-Cola,' " and then goes on to say that he continued to manufacture and sell this "Celery-Cola" until 1909. As a matter of fact,

"Celery-Cola" is still being manufactured and sold by one of Mayfield's companies,—the J. C. Mayfield Manufacturing Company (Rec., 2446; 860-1).

J. C. MAYFIELD (Rec., 2436):

"Celery-Cola was a caffein drink. \* \* \* It would be classified with the dope drinks."

R. K. SMITH, head dispenser at the United Cigar Stores Company, Nashville (Rec., 1189):

"I think about the first time I heard of 'Celery-Cola' was about nine or ten years ago. It is similar to 'Coca-Cola' in taste and color."

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1073):

"The 'Coca-Cola' and 'Celery-Cola' are like all those cola drinks. I could not tell any difference from the other cola drinks. \* \* \* 'Celery-Cola' resembles all these cola drinks. As compared with 'Coca-Cola,' you could not tell the difference." (Rec., 107.).

W. M. SIDEBOTTOM, manager of Skalowski's, Nashville, says that Mayfield was making "Celery-Cola" in Nashville fifteen or eighteen years ago, and that he was handling it then. (Rec., 1162). He adds (Rec., 1162-3):

"The 'Celery-Cola' was similar to all cola drinks. \* \* \* The color was dark, very much the same as Coca-Cola."

Plaintiff's detective, Frederick Conway Peace, admits that "Celery-Cola" is "similar in color to 'Coca-Cola.'"

(Rec., 2205-6); while plaintiff's chief detective, H. B. Pierce, admits that "Celery-Cola" has "about the same color," and "pretty much the same general taste," as "Coca-Cola." (Rec., 2132).

The manufacture and sale of "Celery-Cola" during the period above indicated is shown by the following of defendants' witnesses:

J. C. Mayfield, (Rec., 1595 et. seq.; 2424);  
 J. W. Mayfield, (Rec., 1535 et. seq.);  
 S. T. Mayfield, (Rec., 1472 et. seq.);  
 J. C. Mayfield, Jr., (Rec., 1565 et. seq.);  
 W. H. Boylin, (Rec., 1072);  
 Adam Diehl, (Rec., 1085);  
 W. M. Sidebottom, (Rec., 1162);  
 J. B. Freed, (Rec., 1172);  
 F. C. Dorider, (Rec., 1195);  
 W. F. Neal, (Rec., 1329);  
 A. S. Joseph, (Rec., 1330);  
 Mrs. M. L. Edwards, (Rec., 1337);  
 H. O. Adams, (Rec., 1343);  
 E. D. Montgomery, (Rec., 1357);  
 John Smith, (Rec., 1387).

The manufacture and sale of "Celery-Cola" as above shown, is admitted by the following of plaintiff's witnesses:

S. A. Ellis, (Rec., 1843);  
 L. M. Barclist, (Rec., 1845);  
 C. J. Pogue, (Rec., 1857);  
 D. E. Moody, (Rec., 1881);  
 B. U. Hopper, (Rec., 1891);  
 W. M. Smith, (Rec., 1893);  
 J. T. Ensley, (Rec., 1901);

Thomas Dickson, (Rec., 1907);  
 Homer Brewer, (Rec., 1912);  
 Tom Anderson, (Rec., 1913);  
 George Anderson, (Rec., 1917);  
 Mack Crawford, (Rec., 1921);  
 Walter Thomas, (Rec., 1922);  
 Will Barrow, (Rec., 1925);  
 John L. Bevel, (Rec., 1930);  
 M. J. Handley, (Rec., 1989);  
 A. B. Quick, (Rec., 2000);  
 A. G. Weber, (Rec., 2001);  
 J. W. Huggins, (Rec., 2023);  
 Norville N. Leaver, (Rec., 2035);  
 John H. Bohne (Rec., 2041);  
 Ernest Higgin, (Rec., 2069);  
 Henry Hartman, (Rec., 2072).

### **(c).—The cola beverage known as Wine of Coca.”**

It is admitted (Plaintiff's brief p. 61) that J. C. Mayfield also manufactured and sold “Wine of Coca,”—not only the wine tonic, but the soda fountain beverage as well,—and that it was marketed until at least 1909. It is not denied that “Wine of Coca” was similar in color and taste to “Coca-Cola.”

J. C. MAYFIELD says that in 1893 he and his associates decided to market the “Wine of Coca” as a soda fountain beverage. (Rec., 1592-3). “The only thing to leave out was the wine, and put in sugar and water, is my recollection.” (Rec., 1592; 2433-4). “Wine of Coca” was then manufactured and sold for a number

of years, not only in and around Atlanta, but in nearly all the southern states, and as far north as Boston. (Rec., 1593).

In an affidavit made by Mrs. Diva Brown, deceased, (formerly Mrs. J. C. Mayfield), and read into the record in this case by plaintiff (Rec., 1096-7), it is said:

"The Wine of Coca Company, up to eight years ago, sold more goods in some of the southern states than did the Coca-Cola Company, especially in Mississippi, Louisiana, Alabama, and part of Georgia. \* \* \* The Wine of Coca Company is now owned by Boston parties, with headquarters at Boston, Mass."

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola," Atlanta, (Rec., 1292-1296):

"I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups at that time of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them. \* \* \* There were several at that time. \* \* \* 'Wine of Coca' was originally a medicine, but they afterwards put it into syrup form and put it on the market as a soda fountain drink. \* \* \* That has been a long time ago. \* \* \* I knew 'Wine of Coca' before I got into the bottling business; it was a medicine then, and, as a syrup, about twenty years ago. That syrup at that time, [and] the drink made therefrom, was about the same in color and taste as the color and taste of 'Coca-Cola.'"

GEORGE R. EDMONDSON, a retail druggist, Atlanta (Rec., 1301):

"I think years ago,—possibly just after I came to Atlanta,—we sold a little 'Wine of Coca.'"

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, 'Tenn. (Rec., 767; 969):

"I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola' (See *defendant's exhibit 4*), and the same as 'Coca-Cola.' \* \* \* The taste of these cola drinks mentioned are very near the same, similar in taste. \* \* \* The 'Wine of Coca' syrup is the same color as Coca-Cola syrup."

F. C. BORIDER knew "Wine of Coca" as a soda fountain drink years ago (Rec., 1195).

C. H. CRIMM, Tennessee manager of the Germania Life Insurance Company of New York, Chattanooga, 'Tenn. (Rec., 1040):

"I know J. C. Mayfield very well indeed. I first met him in Atlanta. I met him in 1897. At that time he was manufacturing drinks,—'Wine of Coca,' and this other stuff that he had there. \* \* \* He had two drinks besides the 'Wine of Coca.' \* \* \* That 'Wine of Coca' was a drink something similar to the 'Coca-Cola.' It was a syrup he was manufacturing. The other drink I speak of was a similar drink. \* \* \* There was not much difference in taste. The color of those drinks at that time was brown,—similar to the color of 'Coca-Cola.'"



**(d).—The cola beverage known as “Pepsi-Nola.”**

It is also admitted that J. C. Mayfield manufactured and sold “Pepsi-Nola” from about 1903 to 1909. (Plaintiff’s brief p. 61).

This “Pepsi-Nola” was still another cola drink, only it had a slight pepsin flavor.

J. C. MAYFIELD (Rec., 2438):

“The two distinct differences between ‘Celery-Cola’ and ‘Pepsi-Nola’ are that ‘Pepsi-Nola’ had present in it pepsin, and ‘Celery-Cola’ had celery in it. That is the two distinct differences. \* \* \* ‘Pepsi-Nola’ was a cola beverage.”

The manufacture and sale of “Pepsi-Nola” from 1903 to 1909 is shown by the following, among others, of defendants’ witnesses:

J. C. Mayfield, (Rec., 1599);

J. W. Mayfield, (Rec., 1535 et seq.);

S. T. Mayfield, Rec., 1474 et seq.);

E. D. Montgomery, (Rec., 1367);

and is admitted by the following of plaintiff’s witnesses:

J. T. Ensley, (Rec., 1901);

Walter Thomas, (Rec., 1922);

D. E. Moody, (Rec., 1884);

C. J. Pogue, (Rec., 1861);

W. M. Smith, (Rec., 1893);

Thomas Dickson, (Rec., 1907);

George E. Anderson, (Rec., 1917);

Will Barrow, (Rec., 1925);

John L. Bevel, (Rec., 1930);

M. J. Handley, (Rec., 1989).

**Beverages Manufactured by Others, Having  
the Same Color and Taste as "Coca-Cola,"  
Which Have Been on the Market  
For Years.**

**(a).—"Star-Cola,"—since 1900.**

ADAM DIEHL (Rec., 1083; 1085):

"We manufacture a cola drink,—'Star-Cola.' We have been putting out that drink for about fifteen years. \* \* \* I put 'Star-Cola' on the market for the first time about fifteen years ago. There were eight or ten, or fifteen cola products at that time."

**(b).—"Afri-Cola,"—since 1899.**

LEE HAGAN (Rec., 1292, 1296):

"I got into the 'Afri-Cola' sixteen years ago. \* \* \* I think Mr. Asa G. Candler, the president of the Coca-Cola Company, knows that I am in business here. I expect he has known it as long as I have, so far as I know. He has known over all that time all the time I have been making and selling these cola beverages, that I have been in that business of making them. He has never sued our company or taken any steps to oppose our right to manufacture our products and sell them. The Coca-Cola Company has never taken any steps against our company to contest our right to manufacture our syrup in the way we do, and sell it in the way we do."

ASA G. CANDLER (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir; I think I have

seen it,—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. \* \* \* Yes, sir; there is a 'KoNut,'—that is run by the same gang, I think. \* \* \* I understand Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut.' I think they have been making it ten or twelve years."

F. M. ROBINSON (Rec., 361-2):

"I know there is such a firm as Hagan & Dodd in Atlanta, but I am not personally acquainted with them. \* \* \* I have known this firm, I expect, about ten years or a dozen years, maybe more, I don't remember. I see by the papers they are making a product called 'Ko-Nut.' \* \* \* Yes, sir; to make a guess, I have seen Hagan & Dodd's advertising,—their 'Ko-Nut' or 'Afri-Cola,'—about ten or a dozen years. It has been a good while. During all of that time I was secretary of the Coca-Cola Company."

MR. HIRSCH, General Counsel for the Coca-Cola Company, (Rec., 1296):

"We admit on the part of the Coca-Cola Company that Mr. Lee Hagan has been in business as long as he says he has been in business, and that it was known by the Coca-Cola Company that he had been in that business."

### (c).—"Dixie"—since 1898.

LEE HAGAN (Rec., 1291):

"I made a similar product of that character before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.'"

**(d).—"Dope,"—(Atlanta), since at least 1903.**

LEE HAGAN (Rec., 1294):

"There was a concern here in Atlanta that used to put out a product under the name of 'Dope.' The name of that concern was Dope Company. I think they labeled their bottles 'Dope.' They advertised their product in Atlanta. \* \* \* It was a caffein drink,—one of these cola drinks. It was similar in color and taste to Coca-Cola. This concern in Atlanta put out these goods under the name of 'Dope' twelve years ago, to the best of my recollection."

E. A. SHARP, a retail druggist, Jacksonville, Florida (Rec., 1255):

"I have always heard there was a 'Dope,' as far as that is concerned, which was different from 'Coca-Cola.' I first seen it advertised right in Atlanta twelve years ago."

GEORGE J. MARTIN, one of plaintiff's traveling salesmen (Rec., 340-1):

"I heard it rumored years ago—it has been twelve years ago,—here in Atlanta, Georgia, a thing came out and they called it 'Dope.'"

**(e).—"Dope"—(Birmingham), since 1902.**

A. E. CAMPBELL (Rec., 1363-4; *Defendants' Exhibits 24 to 27, inclusive*):

"In 1902 I was steward of the Southern Club and

purchasing agent for the bar and cafe, and I put in the Houppert & Worcester products. At that time they had aerated waters,—Wauseka Waters,—and aerated waters, soda, sarsaparilla, and a product they called 'Dope.' I bought that 'Dope.' I continued to buy it continuously while I was steward of the Club, and afterwards, upon starting a business of mine, I continued to handle their goods. \* \* \* *Defendants' Exhibit 24* is a bill-of-sale between Houppert and Worcester, where Worcester sold his interest in the bottling plant. \* \* \* Houppert sold Worcester's interest to Smyly, E. J. Smyly. Smyly and Houppert sold their interest to the National Dope Company. That was a corporation. The National Dope Company continued business quite a while, and then I think it was in 1911 the business was transferred to the Birmingham Bottling Company. \* \* \* After that the Birmingham Bottling Company sold that copyright (trade-mark registration of the word 'Dope' in the Patent Office, *Defendants' Exhibits 26 and 27*), to Mayfield & Mayfield."

E. J. SMYLY (Rec., 1392):

"I am bottling soda waters and 'Dope' and almost all kinds of aerated waters. \* \* \* That 'Dope' comes under the head of caffein drinks,—a cola beverage. I have known of that product, 'Dope,' to the best of my recollection, about fifteen years,—when I was working for Houppert & Worcester. \* \* \* I acquired an interest in making and selling that syrup in 1905. \* \* \* Houppert & Worcester dissolved partnership. Houppert took the business. Worcester sold out to him. I bought a half interest from Houppert. \* \* \* When we first went into business together it was

known as 'Houpper & Smyly, Birmingham Bottling Works.' We stayed in partnership until we organized the National Dope Company, and we continuously made this product up to that time. After we organized the National Dope Company, the business, good will, etc., was transferred to that company. \* \* \* We continued under the name of National Dope Company until sometime in January,—the latter part of January, 1911. After that we reorganized and incorporated under the name of Birmingham Bottling Company. The Birmingham Bottling Company manufactured and sold this syrup after that. After that we sold the rights \* \* \* to Mayfield & Mayfield."

J. C. MAYFIELD, Sr., Rec., 1620):

"*Defendants' Exhibit 28* is an assignment from the Birmingham Bottling Works to Mayfield & Mayfield of the trade-mark 'Dope' and the business and good will connected therewith, dated May 6th, 1913. *Defendants' Exhibit 32* is a bill-of-sale and assignment of the trade-mark 'Dope' and the business and good will connected therewith, from Steve T. Mayfield and James C. Mayfield, doing business as Mayfield & Mayfield, to the Koke Company of America, dated the 26th of December, 1913. This is my signature. After the assignment of this 'Dope' to the Koke Company of America, the Koke Company of America, through its agents, licensees, began and continued to sell 'Dope' continuously. \* \* \* They have continued up to the present time."

(f).—"Koke,"(Murfreesboro, Tenn.), — since 1902; "Nerve-Ola,"—since prior to 1902.



J. W. HUGGINS, a "Coca-Cola" bottler, who formerly bottled a cola beverage to which he applied the name "Koke" (Rec., 2012-13):

"I swore in my application for registration of the word 'Koke' that the trade-mark 'Koke' had been used continuously in our business since about May 1st, 1902, and I think that is about true. \* \* \* 'The first product we bottled and labeled 'Koke' was, I think, 'Nerve-Ola,' but we have bottled several different things that we branded 'Koke,'—several of these different cola drinks. What we got from the 'Nerve-Ola' people was the completed syrup. It looked and tasted pretty much like 'Coca-Cola.' We took that product and bottled it and labeled it 'Koke.' Then we manufactured a syrup that we labeled 'Koke' that we made from a formula that we were trying to reproduce 'Coca-Cola.' We got that formula from somebody, I think, in Florida. \* \* \* We made that product ourselves from the formula that we got. \* \* \* Then we had Wampole try to make us up some syrup by this formula,—Wampole, of Philadelphia. This syrup that we made we percolated the coca leaves and got the extract out of it. \* \* \* We put caffeine in. \* \* \* We used to buy from H. K. Wampole & Company of Philadelphia, I believe, in syrup form by the barrel, a syrup that they called 'Nerve-Ola,' which we used more than anything else, and then we ourselves mixed the syrups that we used this name [Koke] on. (Rec., 2007). \* \* \* We sold 'Koke' from 1902 up to 1909 (Rec., 2017). \* \* \* Ultimately a deal was consummated whereby Christy & Huggins and the Murfreesboro Bottling Works sold to Mayfield, or his company, this registered trade-mark 'Koke.'" (Rec., 2008; see *Defendants' Exhibits 67 and 129.*)... See also S. B.

'Christ, the partner of J. W. Huggins. (Rec., 2027-8-9).

**(g).—"Koke,"—(Texas) since 1905.**

J. G. PYLE (Rec., 1724):

"The first time I ever heard the word 'Koke,' I was in West Texas,—I think it was about 1904, at Albany, Texas, and I went and asked for 'Coca-Cola.' They said 'We have not got Coca-Cola.' I said, 'What have you got?' He said, 'Koke.' I said, 'What is Koke?' He said, 'Well, it is something similar to Coca-Cola. I asked him to give me a 'Koke,' and he drew a 'Koke.' \* \* \* They drew the 'Koke' out of a keg, a five gallon keg. He told me at the time where it came from. He said it is made over there at some small town, maybe Cisco, something like that."

**(h).—"Cola-Ade,"—since 1898.**

F. C. DORIDER (Rec., 1196-1198):

"We began handling 'Cola-Ade' I think about eight or nine years ago. \* \* \* We sold a good deal of 'Cola-Ade' for awhile. \* \* \* 'Cola-Ade' is made in Atlanta, I think. I don't know whether anybody knew about 'Cola-Ade,' or not. We knew it and advertised it,—stenciled it in our floor."

W. M. SIDEBOTTOM (Rec., 1163):

"There are a great many cola drinks on the market,—the 'Celery-Cola,' 'Star-Cola,' 'Cola-Ade.' I have known cola drinks on the market, to my best

recollection, twenty-five or twenty-eight years, I guess."

R. W. BROWN (Plaintiff's Witness), (Rec., 682):

"There is a bunch of drinks on the market similar to 'Coca-Cola.' I don't recollect the names of all of them, but there are quite a number of them. I think there is one called 'Cola-Ade.'"

**(i).—"Queen-Ola," "Rye-Ola," "Wise-Ola,"  
"Ale-Cola,"—since 1903.**

D. E. MOODY, plaintiff's witness (Rec., 1881; 1887):

"I got acquainted with Mr. J. C. Mayfield, Sr., about the latter part of 1903 or the first part of 1904. I bought a third interest in the bottling works on Powell Avenue and 20th Street in the latter part of 1903, and Mr. Mayfield shortly after that visited that place and I got acquainted with him. B. U. Hopper and John T. Ensley, were interested with me in that bottling plant. We called it the Celery-Cola Company. \* \* \* You ask how many cola drinks there were on the market in Birmingham at the time I was in the bottling business and with the Celery-Cola Bottling Company; why, at that time Mr. Peck was manufacturing a drink over here which he called 'Rye-Ola,' and there was a 'Wise-Ola' bottling plant,—those two are the only ones that I remember, at that time. \* \* \* Yes, sir; I remember about 'Ala-Cola' also, and there was one at Bessemer,—I had forgotten about that. \* \* \* I have been making a drink I call 'Queen-Ola' up

to last fall. I have been making it some three or four years. Yes, sir; that is a syrup for making a soda fountain beverage. \* \* \* I color it artificially with caramel. \* \* \* You ask if I think a casual purchaser could tell the difference between my product and 'Coca-Cola' by the color; well, mine is a good deal darker, almost as dark as root beer. (The witness was asked if he could tell the difference between a glass of his product, 'Queen-Ola,' poured into a glass, and a glass, say, of 'Rye-Ola,' but he did not answer the question.) You ask why I colored my drink with caramel; most of these drinks are colored that way. (Rec., 1946). \* \* \* You ask why I colored it that color instead of pink, or green, or some other color; it's just customary for it to be colored that way. I could not tell you whether or not anybody that bottles a drink like that colors it that way. You ask if I have ever seen a drink of that sort that was not that same color; there are some darker than others, but they are all about the same general color, oh, yes." (Rec., 1947). See, also, H. O. Adams, Rec., 1344.

**(j).—"Lime Juice & Cola,"—since 1905.**

EDWARD T. LANGAN, plaintiff's witness (Rec., 896):

"I have dispensed 'Lime Juice & Cola' and 'Cola-Mint.' \* \* \* That has been on the fountain right along for the last ten years. Yes, sir; it is the same color as 'Coca-Cola.' I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Co., at Detroit."

**(k).—"Dr. Pepper,"—since 1897.**

J. M. PENLAND, (Plaintiff's Witness) of Waco, Texas, (Rec., 1983):

"The drink known as 'Dr. Pepper' is still being sold in Waco. I don't know how long it has been on the market, but I have known it fifteen or eighteen years."

JACOB SCHRODT, a retail druggist, Dallas, Texas, (Plaintiff's witness), Rec., 743):

"'Dr. Pepper' is a soda fountain beverage, and is a syrup like 'Coca-Cola.' "

C. J. THORNTON, a retail druggist, Hattiesburg Miss., (Rec., 1760):

"I have heard people call for 'dope' ever since there has been a cola on the market. I have heard 'Dr. Pepper' called 'dope.' \* \* \* I used to drink it and I called for it as 'dope.' It is supposed to be good for headache. \* \* \* Take 'Dr. Pepper,' that is the first I ever heard called 'dope.' \* \* \* About eighteen years ago I called for 'dope' and got a drink of 'Dr. Pepper.' (Rec., 1767). The first time, eighteen years ago, was 'Dr. Pepper,' was the first I ever called 'dope.' "

W. A. HICKMAN, Monticello, Miss., (Rec., 1828):

"I handle 'Dr. Pepper' at our soda fountain."

**(1).—"Orin-Cola,"—since 1904.**

NORVILLE N. LEAVER, (Plaintiff's witness),  
(Rec., 2036):

"I am a manufacturer of soft drinks. \* \* \* I put out a drink known as 'Orin-Cola.' That is a drink something similar to 'Coca-Cola.' \* \* \* It looks like 'Coca-Cola.' It is colored the same as 'Coca-Cola.' \* \* \* I have been making this drink since March 1st, 1904. \* \* \* I don't know why I color this particular drink the color it is,—except it is the custom from experience, when people ask for lemon soda you have to have a white soda, and if they ask for sarsaparilla it is black; if they ask for 'Dr. Pepper' it is black; and we color that for that simple reason, I suppose. I give it the flavor it has because people like a flavor of that kind."

JOHN H. BOHNE, (Rec., 2045):

"After I left Mayfield I went in partnership with him [Norville N. Leaver] in 1904 in the manufacture and sale of a drink called 'Orin-Cola.' \* \* \* The color of 'Orin-Cola' was a brown color like the usual cola drinks. Most all of the cola drinks that I ever saw are about the same color. I never saw any difference in them so far as the color is concerned. Burnt sugar produces that color."



## SCHEDULE V.

### Drinks Now on the Market Having Same Color and Taste as Coca-Cola.

#### 1.

#### Physical Exhibits.

The best evidence of the drinks now on the market having the same color and taste as "Coca-Cola" are the drinks themselves. Bottles containing a few of the many drinks of this character, which were purchased in the open market at the time the testimony in this case was being taken, were placed in evidence so the court could see for itself just what these drinks look and taste like.

In the tabulation below the first column shows the exhibit number, the second the name of the drink, the third the place where purchased, the fourth the date of purchase, the fifth by whom purchased or identified, and the sixth the page of the record where the exhibit is identified:

1	2	3	4	5	6
Deft's.		Chatta. Bot.		Henry	
Ex. 1.....	Koke .....	Works .....	2-11-15	Boerger .....	968
Defts'.	Tru-	Union Bot.		R. F. Zimmer-	
Ex. 2.....	Cola .....	Works .....	2-11-15	man .....	979-80
					1090
Defts'.	Fletcher's			John D.	(Orig.
Ex. 3.....	Cola .....	Nashville .....	2-17-15	Fletcher .....	Tr. 440)
					1084
Defts'.	Star-	Diehl & Lord,			(Orig.
Ex. 4.....	Cola .....	Nashville .....	2-17-15	Stipulation .....	Tr. 807)
Defts'.	Coca-	Open Market,			(Orig.
Ex. 6.....	Cola .....	Nashville .....	2-17-15	Stipulation .....	Tr. 807)
		Crockett			

Defts'. Ex. 43.....	Star-Cola .....	Cafe, Nashville .....	J. W. 11-30-14 Mayfield .....	1523
Defts'. Ex. 44.....	Star-Cola .....	W. P. Watsn, Nashville .....	J. W. 11-30-14 Mayfield .....	1523
Defts'. Ex. 45.....	Star-Cola .....	Harry Seidell, Nashville .....	J. W. 11-30-14 Mayfield .....	1523
Defts'. Ex. 46.....	Cola-Nip .....	Peel's Bar, Birmingham .....	J. W. 12-16-14 Mayfield .....	1523
Defts'. Ex. 47.....	Cola-Nip .....	Mecca Hotel Bar, Birmingham .....	J. W. 12-16-14 Mayfield .....	1524
Defts'. Ex. 48.....	Cherro-Cola .....	Svibone, Bessemer, Ala. .... Simp. Bervin Grocery Store, Bessemer, .....	J. W. 12-16-14 Mayfield .....	1524
Defts'. Ex. 49.....	Rye-Ola .....	Ala. .... Jesse Call's, Nashville .....	J. W. 12-16-14 Mayfield .....	1524
Defts'. Ex. 50.....	Gerst's-Cola .....	Nashville .....	J. W. 11-13-14 Mayfield .....	1524
Defts'. Ex. 51.....	Kola-Rex .....	Reliance Bar, Birmingham .....	J. W. 12-17-14 Mayfield .....	1524
Defts'. Ex. 52.....	Dope .....	W. L. Del- heim's, Birmingham .....	J. W. 12-17-14 Mayfield .....	1524
Defts'. Ex. 53.....	Co-Co. ....	Johnson Bros., Birmingham .....	J. W. 12-17-14 Mayfield .....	1524
Defts'. Ex. 54.....	Star-Cola .....	Charles, Nashville .....	J. W. 11-30-14 Mayfield .....	1524
Plff's. Rebuttal Ex. 69.....	Dope .....	Florence Bar, Birmingham .....	M. D. Ziegler 2-26-15 (Frank Clapp, .....	1932 2182
Plff's. Rebuttal Ex. 73.....	Misty-Cola .....	Terminal Bar, Birmingham .....	Frank Clapp 3-15-15 M. D. Ziegler .....	2181 1923
Plff's. Rebuttal Ex. 74.....	Cola-Mint .....	Wodward Bar, Birmingham .....	Frank Clapp 3-15-15 M. D. Ziegler .....	2181 1923
Plff's. Rebuttal Ex. 76.....	.....	Morris Hotel Bar .....	Frank Clapp 3-15-15 M. D. Ziegler .....	2181 1923
Plff's. Rebuttal Ex. 77.....	.....	Morris Hotel Bar .....	Frank Clapp 3-26-15 M. D. Ziegler .....	2181 1923
Plff's. Rebuttal Ex. 125.....	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them .....	Dr. H. B. Fuller .....	.....	2267
Plff's. Rebuttal Ex. 126.....	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them .....	Dr. H. B. Fuller .....	.....	2267

Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 127	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 128	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 129	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 130	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 131	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 132	and sent in by them.....	Fuller ..... 2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 133	and sent in by them.....	Fuller ..... 2267
Plff's.		
Rebuttal		Dr. H. B.
Ex. 134	Said to be Coca-Cola.....	Fuller ..... 2267

## 2

**Testimony of Defendants' Witnesses.****(a).—Manufacturers.**

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1641):

"There are a great many other cola beverages besides our 'Koke' and 'Dope' on the market to-day to my knowledge. I know of quite a number, and have heard of at least a couple of hundred. I can enumerate some. There is 'Wine-Coca,' 'Ala-Cola,' 'Wise-Ola,' 'Afri-Cola,' 'Ko-Nut,' 'Coca-Nola,' 'Pepsi-Cola,' 'Lemon-Cola,' 'Chero-Cola,' 'Nifty-Cola,' 'True-Cola,' and 'Cola-Nip,' 'Star-Cola,' 'Diehl's Cola—no, not Diehl's Cola, 'Perst's Cola'—and 'Mar-Cola,' 'Farri-Cola,' 'Ala-Cola,' 'Mint-Cola,' 'Lime-Cola,'—or 'Lime-Ola,' I do not know which. 'Wine of Coca' was a soda fountain syrup since 1893. All these different beverages I have mentioned are of the same color. Some of them have a little different taste. It is a pretty hard matter, but, of course, the different goods—the same pieces of goods will vary in flavor, but you might say they are all uniform flavor,—some little variation on account of age, maybe. The color of all these beverages is about the same as our product 'Koke' and 'Dope.' I never saw a cola beverage that was not the same general color, or the same general taste."

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks, and manufacturers of "Star-Cola," Nashville (Rec., 1084-5):

"There are forty or fifty other cola drinks on the market to-day that I know of—I could not mention them all. I have known of cola drinks on the market I suppose twenty-five years. They are all about the same color as 'Coca-Cola.' All cola drinks have the same taste. (Rec., 1084). \* \* \* I have never seen a cola product not the same general color as these I have spoken of. I have never tasted one not the same general taste as ours." (Rec., 1085).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1092-3):

"I know of others on the market,—cola beverages,—probably a dozen or more. They are of the same color as 'Coca-Cola,' all that I ever saw. They are similar in taste to 'Cola-Cola.' They all have pretty much the same general taste. We color our drink with caramel. (Rec., 1092). \* \* \* I have never seen a cola beverage not the same general color, I have never tasted one not the same general taste, as 'Coca-Cola.' My beverage is similar to it. Those bottles, the color and taste of the drink, are common to the trade." (Rec., 1093).

LEE HAGAN, president of The Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1291-2):

"The color of 'Ko-Nut' syrup is similar to 'Coca-Cola' and the other cola beverages on the market. I have made a similar product, of that character, before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.' (Rec., 1291). \* \* \* I can not say how many caffeine preparations there are on the market

at the present time, except I know there are a good many of them. There is several right around this locality, such as 'Chero-Cola,' 'Gay-Ola,' 'Rye-Ola,' 'Tru-Cola,' 'My-Coca,' 'Joy-Ola,' 'Glee-Ola' \* \* \* 'Mo-Ola,' \* \* \* 'Ala-Cola,' 'Uncle Sam.' I have known of cola drinks—these caffeine drinks,—not counting 'Coca-Cola,'—for about sixteen years. I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups on the market of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them, and I have forgotten what the others were; there were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards made it into syrup form and put it on the market as a soda fountain drink. \* \* \* I have never seen a cola drink that was not of the same general color as our product and 'Coca-Cola' are to-day. They are all colored with caramel coloring. \* \* \* I color our product with caramel coloring." (Rec., 1092).

### **(b).—Bottlers.**

HENRY BOERGER, president of the Chattanooga Bottling Workers, Chattanooga, who has been bottling soda water for 26 years (Rec., 967, 969-70) Chattanooga, Tenn.:

"During that time I have bottled a good many different flavors,—lemon, strawberry, ginger ale, and all the different kinds of soft drinks. I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star-Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola,' and the same as 'Coca-Cola.' 'Gay-Ola'



is the same color. The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 967). \* \* \* I have known other drinks on the market similar in color, taste, and appearance to 'Coca-Cola' for about ten or eleven years. (Rec., 968) \* \* \* The color of the syrup of 'Gay-Ola' is similar to 'Coca-Cola' syrup. The color of 'Star-Cola' syrup is the same color as 'Coca-Cola' syrup. The 'Wine of Coca' syrup is the same color as 'Coca-Cola' syrup. I have never seen any syrup for a cola beverage that was not that same color. I have never seen a cola beverage on the market that was not substantially the same color as 'Coca-Cola.' \* \* \* There are hundreds of cola beverages on the market. Besides those I have mentioned are 'Afri-Cola' and 'Ala-Cola.' 'Afri-Cola' has been on the market ten or eleven years." (Rec., 969-70).

R. F. ZIMMERMAN, proprietor of the Union Bottling Co., Chattanooga, Tenn., which bottles "True-Cola" (Rec., 978-81):

"I have bottled cola drinks. (Rec., 978) \* \* \* When I first went in business I bottled a cola drink that I made myself, practically five years ago. \* \* \* It compared with the color of 'Coca-Cola' in that it was colored with burnt sugar,—practically the same color. I could not distinguish one from the other, and the tastes were very much alike—the ingredients were almost the same as the original 'Coca-Cola' of to-day. (Rec., 979) \* \* \* I have been bottling the drink in Exhibit No. 2, ['Tru-Cola'] nearly four years, also sarsaparilla and root beer. \* \* \* I have known the drinks sarsaparilla and root beer since '91—twenty-five years ago, or more. The color of root beer and sarsaparilla that I knew at

## 2

**Testimony of Defendants' Witnesses.****(a).—Manufacturers.**

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1641):

"There are a great many other cola beverages besides our 'Koke' and 'Dope' on the market to-day to my knowledge. I know of quite a number, and have heard of at least a couple of hundred. I can enumerate some. There is 'Wine-Coca,' 'Ala-Cola,' 'Wise-Ola,' 'Afri-Cola,' 'Ko-Nut,' 'Coca-Nola,' 'Pepsi-Cola,' 'Lemon-Cola,' 'Chero-Cola,' 'Nifty-Cola,' 'True-Cola,' and 'Cola-Nip,' 'Star-Cola,' 'Diehl's Cola—no, not Diehl's Cola, 'Perst's Cola'—and 'Mar-Cola,' 'Farri-Cola,' 'Ala-Cola,' 'Mint-Cola,' 'Lime-Cola,'—or 'Lime-Ola,' I do not know which. 'Wine of Coca' was a soda fountain syrup since 1893. All these different beverages I have mentioned are of the same color. Some of them have a little different taste. It is a pretty hard matter, but, of course, the different goods—the same pieces of goods will vary in flavor, but you might say they are all uniform flavor,—some little variation on account of age, maybe. The color of all these beverages is about the same as our product 'Koke' and 'Dope.' I never saw a cola beverage that was not the same general color, or the same general taste."

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks, and manufacturers of "Star-Cola," Nashville (Rec., 1084-5):

"There are forty or fifty other cola drinks on the market to-day that I know of—I could not mention them all. I have known of cola drinks on the market I suppose twenty-five years. They are all about the same color as 'Coca-Cola.' All cola drinks have the same taste. (Rec., 1084). \* \* \* I have never seen a cola product not the same general color as these I have spoken of. I have never tasted one not the same general taste as ours." (Rec., 1085).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1092-3):

"I know of others on the market,—cola beverages,—probably a dozen or more. They are of the same color as 'Coca-Cola,' all that I ever saw. They are similar in taste to 'Cola-Cola.' They all have pretty much the same general taste. We color our drink with caramel. (Rec., 1092). \* \* \* I have never seen a cola beverage not the same general color, I have never tasted one not the same general taste, as 'Coca-Cola.' My beverage is similar to it. Those bottles, the color and taste of the drink, are common to the trade." (Rec., 1093).

LEE HAGAN, president of The Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1291-2):

"The color of 'Ko-Nut' syrup is similar to 'Coca-Cola' and the other cola beverages on the market. I have made a similar product, of that character, before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.' (Rec., 1291). \* \* \* I can not say how many caffeine preparations there are on the market

at the present time, except I know there are a good many of them. There is several right around this locality, such as 'Chero-Cola,' 'Gay-Ola,' 'Rye-Ola,' 'Tru-Cola,' 'My-Coca,' 'Joy-Ola,' 'Glee-Ola' \* \* \* 'Mo-Ola,' \* \* \* 'Ala-Cola,' 'Uncle Sam.' I have known of cola drinks—these caffeine drinks,—not counting 'Coca-Cola,'—for about sixteen years. I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups on the market of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them, and I have forgotten what the others were; there were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards made it into syrup form and put it on the market as a soda fountain drink. \* \* \* I have never seen a cola drink that was not of the same general color as our product and 'Coca-Cola' are to-day. They are all colored with caramel coloring. \* \* \* I color our product with caramel coloring." (Rec., 1092).

### (b).—Bottlers.

HENRY BOERGER, president of the Chattanooga Bottling Workers, Chattanooga, who has been bottling soda water for 26 years (Rec., 967, 969-70) Chattanooga, Tenn.:

"During that time I have bottled a good many different flavors,—lemon, strawberry, ginger ale, and all the different kinds of soft drinks. I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star-Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola,' and the same as 'Coca-Cola.' 'Gay-Ola'

is the same color. The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 967). \* \* \* I have known other drinks on the market similar in color, taste, and appearance to 'Coca-Cola' for about ten or eleven years. (Rec., 968) \* \* \* The color of the syrup of 'Gay-Ola' is similar to 'Coca-Cola' syrup. The color of 'Star-Cola' syrup is the same color as 'Coca-Cola' syrup. The 'Wine of Coca' syrup is the same color as 'Coca-Cola' syrup. I have never seen any syrup for a cola beverage that was not that same color. I have never seen a cola beverage on the market that was not substantially the same color as 'Coca-Cola.' \* \* \* There are hundreds of cola beverages on the market. Besides those I have mentioned are 'Afri-Cola' and 'Ala-Cola.' 'Afri-Cola' has been on the market ten or eleven years." (Rec., 969-70).

R. F. ZIMMERMAN, proprietor of the Union Bottling Co., Chattanooga, Tenn., which bottles "True-Cola" (Rec., 978-81):

"I have bottled cola drinks. (Rec., 978) \* \* \* When I first went in business I bottled a cola drink that I made myself, practically five years ago. \* \* \* It compared with the color of 'Coca-Cola' in that it was colored with burnt sugar,—practically the same color. I could not distinguish one from the other, and the tastes were very much alike—the ingredients were almost the same as the original 'Coca-Cola' of to-day. (Rec., 979) \* \* \* I have been bottling the drink in Exhibit No. 2, ['Tru-Cola'] nearly four years, also sarsaparilla and root beer. \* \* \* I have known the drinks sarsaparilla and root beer since '91—twenty-five years ago, or more. The color of root beer and sarsaparilla that I knew at

that time, compared with the color of this drink to-day, is practically the same. They are all colored with burnt sugar coloring. The color of root beer is practically the same as that of 'Coca-Cola' or any cola beverage. \* \* \* I have known those other cola drinks ever since I have been in business,—since '91. When you come in contact with these cola drinks—so many—you cannot keep tract of them. Drinks similar in taste, color, and appearance to 'Coca-Cola' that I know of on the market to-day are 'Lemon-Cola,' 'this 'Rye-Ola,' 'Roxie-Cola,' 'My-Ola,' 'Misti-Cola,' 'Gay-Óla,' and 'Ameri-Cola,' of Americus, Georgia, and this other, 'Mar-Cola,' that is made in some place. I would have to sit down all day and think of them. It would be enough to mention all day long and think of them. There is another one in town, 'L'Aroma,'—that is a dope drink \* \* \* I have known of cola drinks ever since I have been in Chattanooga, and long before that when I traveled for the brewery, I saw cola drinks all over the country, scattered around, but I paid very little attention to them, then, because I was selling beer. \* \* \* I have never known a cola drink on the market that was not substantially the same color as 'Coca-Cola.' They are all practically the same taste." (Rec., 981).

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., which bottles "Fletcher's Cola" (Rec., 1199-1201):

"I have been connected with other bottlings works. I have bottled other cola drinks. We have bottled 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'My-Ola,' 'Star-Cola,' and bottled other drinks. \* \* \* I have heard of, I guess, about forty or fifty,—something like that,—different cola drinks. I have known of other cola



drinks ever since I have known anything about working at the bottling plants—that has been about eight years. (Rec., 1199) \* \* \* 'The color of these different cola beverages are about the same.' (Rec., 1201).

C. N. BAKER, a soda water bottler, Newman, Ga., (Rec., 406-7) :

"I could not name all the different colas I have bottled. I have bottled the drink I got from Mr. Mayfield, called 'Koke,' (Rec., 1406) \* \* \* Since then I have bottled 'Cola-Creme,' \* \* \* 'My-Coca,' \* \* \* 'Coca-Nola,' 'Rye-Ola,' and I do not know how many. \* \* \* 'There is not but very little difference in all these cola drinks in taste and color, if any.' (Rec., 1407).

### **(c).—Dealers In Bottled Goods.**

A. F. ENSINGER, bar tender at the Eagle's Club, Chattanooga (Rec., 984) :

"Some of the cola drinks I have dispensed are 'Coca-Cola,' 'Koke,' 'Ala-Cola,' 'True-Cola,' 'Oze-Ola,' and 'Maud Muller,'—I do not know whether I can recall any others are not; there has been six or eight more, I guess, that, during that time, would come and go. I have known of other cola drinks on the market for fourteen years, possibly. As compared with the color of 'Coca-Cola,' they all look about the same. As compared with the taste of 'Coca-Cola,' I could not tell any difference."

JOE QUINN, a bar tender, Chattanooga (Rec., 990-1, 2, 4) :

"I handle 'Koke,' white soda, 'Poinsetta,' and 'Sinalco,' and this 'Pan-pepsin,' we handle that, too,—\* \* \* 'Ala-Cola,' we handled that. Other cola drinks I have handled besides that are 'Star-Cola,' 'My-Coca,' and the stuff made by Mayfield, and had some made by Gerst—I forget the name of it. I have known of 'True-Cola' and other cola products on the market similar to 'Coca-Cola' for ten or twelve years. There is no difference in the color of them, compared with the color of 'Coca-Cola.' \* \* \* I do not see any difference [in taste] to amount to anything,—the same general taste. (Rec., 991) \*\*\* I have never seen a cola drink that was not substantially similar in color to 'Coca-Cola.' \* \* \* The color is all the same." (Rec., 994).

F. E. HOOPER, a retail grocer, Chattanooga, Tenn., (Rec., 997):

"I have handled cola drinks. I have handled 'Coca-Cola,' I have handled 'Koke'—I handle 'Koke' now,—'Digestol,' and most all,—I buy from all the wagons that go around town. \* \* \* These cola drinks are pretty much the same color as 'Coca-Cola'—all in dark bottles, and look alike."

M. J. COSTELLO, a bar tender, Chattanooga, Tenn., (Rec., 1000, 1002):

"I have been handling soft drinks for ten years,—bottled goods—soft drinks. I have handled white soda, 'Digestol,' 'Sinalco,' 'Ginger-Ale,' 'Ala-Cola,' 'Tru-Cola,' 'Koke,' 'Rye-Ola,' the coca-cola drinks—'Ala-Cola,' 'Tru-Cola' and 'Coca-Cola'—seem to me to all have about the same color. (Rec., 1000) \* \* \*

I have never seen a cola drink not the same general color as 'Coca-Cola.' (Rec., 1002).

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga, (Rec., 1004) :

"I have handled 'Tru-Cola' and 'Ala-Cola.' They are all about the same color as 'Coca-Cola.' \* \* \* I have never seen a cola drink that was not substanti-ally the same color as 'Coca-Cola.' "

R. W. WAYMAN, a bar tender, Chattanooga, (Rec., 1014-16) :

"I handle soft drinks in connection with my business, some of them being 'Tru-Cola,' white soda, red soda, 'Maud Muller,' 'Poinsetta,' 'Sinalco,' 'Koke,' 'Dope,'—they call it 'Dope.' Other cola drinks I have known of are 'Ala-Cola.' I have known of these other cola drinks since I have been in business,—since they came out. \* \* \* The color of these different cola drinks as compared to the color of 'Coca-Cola,' is about the same, I think. \* \* \* They have the same general taste, along the same general lines. (Rec., 1014) \* \* \* Cola drinks are the same general color as 'Coca-Cola.' (Rec., 1015).

W. F. STRICKLAND, a bar tender, Chattanooga, (Rec., 1048) :

"We handle 'Koke,' 'Maude Muller'—that is a dope—and we used to handle Zimmerman's stuff,—'Dope,' I believe it was,—and also handled 'Coca-Cola.' The color of these different cola drinks, so far as I can see, is about the same."

LUKE POGUE, bar tender, Patten Hotel, Chattanooga, (Rec., 1060):

"I have dispensed a general line of soda water,—red, and white, and ginger ale, 'Digestol,' 'Coca-Cola,' 'Rye-Ola,' 'Gay-Ola,' 'Ala-Cola,' 'Nerve-Ola,' 'Koke,' and 'Gay-Nol.' Most all coke drinks have the same color. \* \* \* I have known of these other drinks on the market similar to 'Coca-Cola' about ten years."

J. C. McDONALD, a bar-tender, Chattanooga, (Rec., 1067-8):

"I have 'Coca-Cola,' 'Cinalco,' 'Poinsetta.' (1067)  
\* \* \* I have got 'Koke' since I have been in business here. When in business with other people we had 'Coca-Cola' for sale, we had 'Ala-Cola,' 'Maude Muller,' and 'Tru-Cola.' The color of those drinks, as compared with 'Coca-Cola,' are practically the same thing. I could not see any difference in them; no one could see any difference at all. I could not see any difference in the taste compared to 'Coca-Cola.' \* \* \* I would not know a glass of 'Coca-Cola,' by its taste, from the other cola drinks I have handled. \* \* \* I have never seen a cola drink not practically the same color as 'Coca-Cola,' and practically the same taste."

J. M. WHEELER, a bar tender, Chattanooga, (Rec., 970, 972):

"I have handled 'Coca-Cola,' 'Maud Muller,' 'Koke,' 'Rye-Ola,' and 'Star-Cola.' I do not know as I can tell any difference in the color of these beverages, compared to the color of 'Coca-Cola,' as they

all appear to be the same thing. \* \* \* There is very little difference in the taste of these cola beverages, as compared with the taste of 'Coca-Cola.' (Rec., 970) \* \* \* The color of 'Koke' is the same as the color of other cola beverages. I do not see any difference in the taste. \* \* \* I have known of these cola beverages similar to 'Coca-Cola' in color, taste, and appearance, four or five years." (Rec., 972).

TOM COLLINS, steward at the Eagle's Club, Chattanooga, (Rec., 988-90):

"Some soft drinks we have are white soda water, 'Koke,' 'Coca-Cola,' 'Poinsetta.' \* \* \* I know of 'Ala-Cola' and this 'Maude Muller,' but we do not handle them any more. The color of these cola drinks is the same as 'Coca-Cola.' \* \* \* I could not tell any difference much in the taste, either. \* \* \* I have known the products root-beer and sarsaparilla ever since I have been here in Chattanooga, about twenty-eight years. The color of root beer and sarsaparilla is about the same as 'Coca-Cola.' (Rec., 988). \* \* \* I have known of other drinks on the market similar in color, taste, and appearance to 'Coca-Cola,' I suppose, for ten years. Some of the drinks of that kind are 'Star-Cola'—that tastes like it—I could hardly tell the difference. 'This 'Maude Miller' tastes a good deal like it." (Rec., 989-990).

E. W. FREEMAN, a bar tender, Chattanooga, (Rec., 973, 5, 6):

"I have handled cola drinks. Some of the drinks are 'Coca-Cola,' 'Rye-Ole,' 'Maude Muller.' (Rec., 973) \* \* \* I am a bar tender and have known of

the cola drinks other than 'Coca-Cola' possibly eight years, and perhaps longer. I have been handling

other cola drinks since I have been in the saloon business the greater portion of that time. \* \* \* I have never seen a cola beverage that was not the same general color as 'Coca-Cola.' They generally taste about alike to me." (Rec., 975-976).

R. W. LOCHRIE, a bar tender at the Woodard Bar, Birmingham, (Rec., 1039-40) :

"I have dispensed soft drinks there, and cola drinks, also. We are handling just at present 'Nifti-Cola.' Before we began handling 'Nifti-Cola,' we handled 'Cola-Nip' and 'Coca-Cola.' (Rec., 1339) \* \* \* 'These different cola drinks are practically all the same color.'" (Rec., 1340).

#### **(d).—Dealers In, and Dispensers of, the Soda Fountain Product.**

W. M. SIDEBOTTOM, (Rec., 1162-3) :

"There are a great many cola drinks on the market—'Celery-Cola,' 'Star-Cola,' 'Cola-Ade.' I have known of cola drinks on the market to my best recollection twenty-five or twenty-eight years, I guess. I have never seen a cola drink that was not the same general color. All cola drinks are very similar in taste. At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola'; we dispense no others besides that."



J. G. BOOTH, soda dispenser at Paul and John Stumbs,' Nashville, (Rec., 1169-70):

"We are dispensing 'Coca-Cola' straight at the place where I am now working. I have known of cola drinks ever since I have known the original 'Coca-Cola.' (Rec., 1169) \* \* \* 'They look alike.' (Rec., 1170).

J. C. PRICE, now proprietor of a restaurant, but formerly a soda dispenser, Nashville, (Rec., 1205-6):

"There are many different brands of cola drinks I have served. I could not call them all. I know a few—'Arrow-Cola,' 'J. D. F. Cola,' 'Koke' and 'Cola,' 'Gay-Ola,' 'Afri-Cola,' and I have dispensed 'Star-Cola,' and 'Gerst's Cola,' too, and 'Coca-Cola.' I have worked in Nashville, St. Louis, Evansville, and Birmingham. At these different towns I have sold different cola drinks. (Rec., 1205) \* \* \* The taste and color of these different cola drinks is almost the same." (Rec., 1206).

BRANCH DARDEN, soda dispenser at Henry Skagg's soda fountain in the Stahlman Building, Nashville, (Rec., 1123-4):

"The cola drinks I dispense are 'Fletcher's Cola,' 'Dope,' 'Coca-Cola,' and others I cannot remember. I have known of these other cola drinks, ther than 'Coca-Cola,' most ever since I have been in the business. (Rec., 1123) \* \* \* Other cola drinks I have known of [are] 'Ala-Cola,' 'Star-Cola,' 'Fletcher's Cola.' They are almost the same color,—look to me like about the same color, \* \* \* pretty much the

same taste. 'They are almost the same color, they seem to me. \* \* \* Just to a casual glance they look about alike.' (Rec., 1124).

P. D. JOHNSON, soda dispenser at the Warner Drug Co., Nashville:

"We dispense 'Coca-Cola' and a black syrup called 'Dope.' 'They used 'Fletcher's Cola' and have used 'Diehl's Star Cola.' (Rec., 1151). \* \* \* The general color of these cola drinks is about the same. At the baseball park here in the summer time they serve Pepsin and Diehl's 'Star Cola.' \* \* \* Diehl's 'Star-Cola' is all that is advertised out there. \* \* \* It is about the same color, taking the concentrated syrup and comparing the two. The beverage that is made from the syrup is about the same as 'Coca-Cola.' " (Rec., 1152).

W. W. RANDOLPH, soda dispenser at the Hoodenpile Drug Co., Nashville (Rec., 1160-1):

"Some of the cola drinks that we have dispensed are 'Star-Cola,' 'My-Cola,' 'Pepsi-Cola,' and I guess about a dozen others. \* \* \* I have heard of about a dozen cola drinks on the market several years back, —as well as I can remember eight years, any way. (Rec., 1160). \* \* \* The color and taste of these different cola drinks are all about the same." (Rec., 1161).

F. H. WILLIS, soda dispenser at "Ha Ha Store, Nashville (Rec., 1191):

"We are dispensing a general line of soda drinks.

Besides 'Coca-Cola,' we have 'Candy-Cola.' The color of 'Candy-Cola' is very similar to 'Coca-Cola.' "

MATT WILSON, proprietor of a retail drug store, Nashville (Rec., 1209):

"I dispense 'Gerst's Cola.' It looks like 'Coca-Cola,' and I never did see any difference in the taste."

F. C. DORIDER, for 24 years in soft drink and confectionery business, Nashville (Rec., 1195-6):

"We handled different kinds of cola,—'Cola-Ade,' 'Celery-Cola,' 'Coca-Cola,' and a good many of those colas, I cannot recall them. \* \* \* Cola drinks besides those I have mentioned are 'Star-Cola,' 'Cola-Ade,' and maybe some others. (Rec., 1195.) \* \* \* They were very much alike in color." (Rec., 1196).

WILLIAM F. DAVIS, an attorney-at-law, and a stockholder in the Davis Funston Drug Co., which has a chain of drug stores in Nashville (Rec., 1102):

"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola,' 'Afri-Cola,' 'Fletcher's Cola,' 'Ala-Cola,' 'Arrow-Cola,' I believe it is,—'Star-Cola,' 'Gerst's Cola,'—not all of those at every place,—at different places, at different times, we have used those cola drinks. I knew of other cola drinks besides 'Coca-Cola' before 1909. \* \* \* Cola drinks on the market today—there are hundreds coming in everywhere; some have been on the market for several

years, I could not tell you how many. 'The color of these different cola drinks, compared with the color of 'Coca-Cola,' is not much different. The taste in many cases is almost indistinguishable."

C. P. EMBREY, proprietor of Embrey Drug Store, Chattanooga (Rec., 1019-20):

"I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola' and one named 'Ko-Nut.' \* \* \* I have heard of 'Tru-Cola.' There are a great many cola drinks on the market. The color of the syrup of these different cola drinks is identical with the color of the 'Coca-Cola' syrup. \* \* \* I have known of the drink root been fifteen or twenty years, I reckon. \* \* \* The root beer I have known for the past fifteen or twenty years has been substantially the same color as it is today. (Rec., 1019). \* \* \* We do not handle Hires' root beer, we have not for years. I could not tell any different between the root beer we handle and Hires'. 'The color is about the same.'" (Rec., 1020).

F. M. BOGAR'T, prescription clerk and soda dispenser, Chattanooga (Rec., 1070):

"We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' \* \* \* They are very much the same in taste as 'Coca-Cola.'"

C. H. JOUE'TT, a retail druggist, associated with the Live & Let Live Drug Co., Chattanooga, and formerly connected with the Miller Pharmacy at Chattanooga (Rec., 1051):

"We handle 'Coca-Cola,' 'Ko-Nut' and 'Ala-Cola,' I think; I do not remember whether we handle any other cola drinks or not. I have known of drinks similar in color, taste and appearance to 'Coca-Cola' I presume for ten or twelve years, probably longer, —fifteen years, probably. 'They are alike in color and taste as far as I am able to state.'" \* \* \*

DR. H. O. NULL, a practicing physician and proprietor of a retail drug store, Chattanooga (Rec., 1063):

"We have cola drinks. 'The only cola drinks we have now are 'Coca-Cola' and 'Ko-Nut.' I have handled a number in my time. I have handled 'Wise-Ola,' 'Luck-Ola,' and 'My-Ola.' I have handled 'Coca-Cola' during the time I have had the soda fountain. We have always handled some cola drink. \* \* \* In a general way they are all similar to each other. 'The taste of these cola drinks, compared with the taste of 'Coca-Cola,' is very similar."

BURTAN JONES, a retail druggist, Chattanooga (Rec., 1106):

"I dispense cola drinks,—'Coca-Cola' and 'Tru-Cola.' 'The color of 'Tru-Cola' syrup is a brown liquid about the same as 'Coca-Cola.' I could not distinguish the difference in color between 'Tru-Cola' syrup and 'Coca-Cola' syrup. I could not distinguish the difference in color between the completed drinks as served at the fountain, and 'Coca-Cola.' I could not distinguish the difference in taste between 'Tru-Cola' and 'Coca-Cola.'"

T. H. LEVER, proprietor of the K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228, 1245-6):

"I have handled the 'Dope' and 'Koke' and 'Coca-Cola.' I know a number of others,—'My-Coca,' 'Ko-Nut,' 'Rye-Ola,' 'Gibb's Cola.' \* \* \* I have kiown of cola drinks ever since I have been in the drug business,—about eight years. These cola drinks are almost the same color, \* \* \* and just about the same in taste. (Rec., 1228). \* \* \* At the Union Drug Co. I handled a product,—I cannot recall the name,—Mr. Sizemore is the gentleman that sold it at that time. It was a heavy cola syrup; the taste and color of it was about the same as 'Coca-Cola.' I handled it before I handled 'Koke' and 'Dope.' " (Rec., 1245-1246).

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250, 4, 6):

"We dispense ice-cream sodas, root beer, Coca-Cola, Koke, Dope, Brain-Ol, Gay-Ola—you know about the line of stuff we handle,—all those. We do not dispense Gay-Ola right at the present time. (Rec., 1250). \* \* \* Every man in my town has always handled three or four different kinds of cola drinks. (Rec., 1254). \* \* \* All these drinks are similar in color and taste to 'Coca-Cola.' " (Rec., 1256).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss. (Rec., 1447):

"This drink 'Ko-Nut' is rather similar to 'Coca-Cola.' You could not hardly tell the difference between them by looking at or tasting them."



C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss. (Rec., 1759-60, 1762):

"I have dispensed at my soda fountain a general line of all flavors, and I have sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Ala-Cola.' \* \* \* The color of these cola drinks is something like the color of root beer,—colored with caramel coloring, I have been always told. The color of the various cola drinks compare very similar with each other. They all taste alike to me. I never saw a cola drink that was not of the same general color and taste. (Rec., 1759, 1760). \* \* \* Sarsaparilla and root beer are the same color, and lots of things are the same color—creme soda is the same color." (Rec., 1762).

### **(e).—Members of the general public.**

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1072-4):

"I know J. C. Mayfield. Have known him, I can say, for twelve or fourteen years. \* \* \* Then he was manufacturing 'Celery-Cola.' \* \* \* It resembled all these cola drinks. As compared to 'Coca-Cola,' you could not tell the difference, (Rec., 1072). \* \* \* The 'Coca-Cola' and 'Celery-Cola' are like those cola drinks. I could not tell any difference from the other cola drinks. (Rec., 1073). \* \* \* We printed labels for hundreds of people for different cola drinks,—'Haskell's Cola,' at Cookeville, North Carolina, and we printed 'Koke' labels for Kelley & Westmore, at Franklin, Ky., and we have printed 'Texa-Cola,' 'Call's-Cola' for some firm in North Carolina, Fletcher's Cola, a Nashville concern, Diehl's 'Star-Cola,' for Diehl & Lord, of Nashville,

'Gerst's Cola,' for Gerst's Bottling Works, of Nashville, and we have printed Heck's 'Star-Cola' for Heck, of Nashville,—there were so many of them—I can get you a list of them from the office. I have known of cola drinks on the market other than 'Coca-Cola' practically ever since I can remember, ever since I have been in Nashville, any way,—that would be eighteen years the first of January. 'The color of all these cola drinks I have seen, as compared with 'Coca-Cola,' are all practically the same color and taste as compared with the taste of 'Coca-Cola.' I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that did not have the same general taste." (Rec., 1074). \* \* \*

E. D. MONTGOMERY, manager of the Eastern Division, Southern Bell Telephone Co., Birmingham, (Rec., 1362-3):

"I do not know how many there is, really there is a number of drinks of that class. Those drinks look alike and taste alike. (Rec., 1362). \* \* \* There are four or five of those drinks you could set out and I could not tell you the difference to save my life, just which is which." (Rec., 1363).

### 3

#### **Admissions of Plaintiff's Witnesses.**

DR. CHARLES E. CASPARI, St. Louis, Mo. (Rec., 901-2):

"I have had experience, also, examining products

that are similar in appearance to 'Coca-Cola,' and have analyzed *three hundred* samples of such products."

DR. H. B. FULLER, plaintiff's chief chemist, Washington, D. C. (Rec., 2266) :

"I have made in the neighborhood of 1500 analytical examinations of other kinds of beverages of the kind and character of 'Coca-Cola.'"

R. W. BROWN, soda water business, New Orleans, La. :

"There is a bunch of drinks on the market similar to 'Coca-Cola.' I do not recollect the names of all of them, but there are quite a number of them, I think there is one called 'Cola-Ade.' " (Rec., 682).

EDWARD T. LAGAN, owner of a lunch room, formerly a drug clerk, Chicago :

"Yes, sir, I have dispensed some of the other cola drinks. I have dispensed 'Lime Juice and Cola,' and 'Cola-Mint,' \* \* \* That has been one the market right along for the last ten years. Yes, sir, it has the same color as 'Coca-Cola.' I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Company, of Detroit. (Rec., 896). \* \* \* I have handled at the fountains and places where I have dispensed drinks both root beer and sarsaparilla. \* \* \* They are the same general color as 'Coca-Cola,' and it would be hard to distinguish between them and 'Coca-Cola.' \* \* \* They are all dark. There are so many other drinks which I have dispensed at my

fountain of that dark color that I really could not begin to tell you how many of them I have dispensed. Almost all of the drinks are dark, \* \* \* that is the general color for drinks at soda fountains,—just about—dark and red and brown.” (Rec., 896-897).

F. C. PEACE, an ex-Pinkerton detective, employed by plaintiff as a detective in this case (Rec., 2105-6, 2217):

“No, sir, I cannot tell the difference between ‘Coca-Cola’ and other drinks on the market. I know of probably ten other drinks on the market that are similar to ‘Coca-Cola.’ \* \* \* I have seen ‘Ko-Nut,’ ‘Rye-Ola,’ ‘Wise-Ola,’ ‘Ala-Cola,’ ‘Lemon-Cola,’ ‘Chero-Cola,’ ‘Celery-Cola,’ ‘My-Cola,’ ‘Moxie,’ and sarsaparilla, and this dark colored creme soda. \* \* \* These drinks are all similar in color to ‘Coca-Cola.’ I have also heard of ‘Star-Cola,’ ‘Luck-Ola,’ ‘Glee-Nol,’ and ‘Tru-Cola,’ but I have never seen those drinks. (Rec., 2105-6). No, sir, I could not tell the difference in taste between ‘Coca-Cola’ and these other cola drinks on the market. \* \* \* The stuff that the Southern Koke Co. make at New Orleans that they call ‘Dope’ and ‘Koke,’ I could not tell the difference between that and ‘Coca-Cola.’ \* \* \* ‘Ko-Nut’ is another one that is hard. \* \* \* ‘My-Coca’ tastes very much like ‘Coca-Cola,’ I cannot tell the difference. \* \* \* ‘Rye-Ola’ and ‘Wise-Ola,’ I think, are very much like ‘Coca-Cola.’ \* \* \* So many of these various cola drinks taste so much like ‘Coca-Cola’ that I cannot tell the difference.” (Rec., 2217).

H. B. PIERCE, chief detective of the Coca-Cola Co. (Rec., 2132):

"I do not know, and have no idea, how many cola drinks there are on the market. I know possibly fifteen or twenty. \* \* \* All of these cola drinks I have known of all have about the same color, and are put up in the same kind of bottle, and have pretty much the same general taste." (Rec., 2132).

C. C. ROSS, one of plaintiff's numerous spotters (Rec., 2174, 2176):

"Yes, sir, I have seen bottles containing other cola drinks. \* \* \* I have seen a great many cola drinks,—I have seen several of them, for instance, 'Chero-Cola,' 'My-Coca,' 'Parafait,' 'Chas.-Cola,' 'Epps-Cola,' 'Rivo-Cola.' I could study up some more, but that is all I can think of right now. (Rec., 2174). \* \* \* If they put sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. Yes, sir, I have seen other drinks similar in color to 'Coca-Cola' in bottles,—'My-Coca' and the others I named awhile ago. I cannot say I have seen any other drinks, other than cola drinks, which are similar in color to Coca-Cola." (Rec., 2176).

NORVELL N. LEAVER, manufacturer of "Orin-Cola," St. Louis, Mo. (Rec., 2036-7):

"I put out a drink known as 'Orin-Cola.' That is a drink similar to 'Coca-Cola.' It looks like 'Coca-Cola.' It is colored the same as 'Coca-Cola.' \* \* \* I colored my drink the color of 'Coca-Cola' for the simple reason that it is customary among the trade. \* \* \* It is the custom, from experience, when people ask for lemon soda you have to have a white soda, and, if they ask for sarsaparilla, it is black; if they ask for 'Dr. Pepper,' it is black; and we

color them for that simple reason, I suppose. I give it the flavor it has because people like flavor of that kind."

JOHN H. BOHNE, an employee of the Liquid Carbonic Company, St. Louis, Missouri, formerly in partnership with Norvell N. Leaver in the manufacture of "Orin-Cola" (Rec., 2045):

"After I left Mayfield, I went in partnership with him [Norvell N. Leaver] in 1904, in the manufacture and sale of a drink called 'Orin-Cola.' \* \* \* The color of 'Orin-Cola' was a dark color, like the other cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them, so far as the color is concerned. Burnt sugar produces that color. \* \* \* My understanding of the thing is that any drinks that would be called under the name of cola usually have the same color." (Rec., 2045).

T. J. HAIZLIP, a retail druggist, Fort Worth, Texas (Rec., 1962-3):

"I have never tried to dispense any of the other beverages, but I have drank it at the other soda fountains. (Rec., 1962). \* \* \* The other products are very similar to Coca-Cola, if I understand it. In other words, personally, I cannot tell the difference between them." (Rec., 1963).

D. E. MOODY, Birmingham, Alabama:

"You ask how many cola drinks there were on the market in Birmingham at the time I was in the bot-



ting business with the Celery-Cola Company [1903-1904]; why, at that time Mr. Peck was manufacturing a drink over here which he called 'Rye-Ola,' and there was a 'Wise-Ola' bottling plant. \* \* \* Yes, sir, I remember about 'Ala-Cola,' also, and there was one at Bessemer. (Rec., 1887). \* \* \* I have been making a drink called 'Queen-Ola,' up to last fall. \* \* \* I have been making it some three or four years. \* \* \* Yes, sir, that is a syrup for making a soda fountain beverage. \* \* \* I colored it artificially with caramel. (Rec., 1888). \* \* \* You ask if I think a casual purchaser could tell the difference between my product and 'Coca-Cola' by the color; well, mine is a good deal darker, almost as dark as root beer. [The witness was asked if he could tell the difference between his product, 'Queen-Ola,' poured into a glass, and a glass of, say, 'Rye-Ola,' but he did not answer the question]. You ask why I color my drink with caramel; most all these drinks are colored that way. (Rec., 1946). \* \* \* You ask why I colored it that color instead of pink, green, or some other color; it is just customary for it to be colored that way. \* \* \* You ask if I have ever seen a drink of that sort that was not that same color; there are some darker than others, but they are all about the same general color, oh, yes. \* \* \* You ask if I ever saw a cola drink that was, say, the color of ginger-ale; I do not know that I ever did." (Rec., 1947).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

"Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola,' I know that there is. (Rec., 1980). \* \* \* The drink

known as 'Dr. Pepper' is still being sold in Waco. I do not know how long it has been on the market, but I have known of it fifteen or eighteen years." (Rec., 1983).

DAVE S. BAUER, retail druggist, Mobile, Alabama:

"Yes, sir, I have heard people ask for cola beverages, besides 'Coca-Cola.' I have heard them ask for 'Gay-Ola,' and for 'Carre-Cola,'—that last is manufactured in Mobile by D. Carre Company, I do not think of any other. 'Carre-Cola' is the same color as 'Coca-Cola.' \* \* \* I do not know whether or not there are as many as 150 cola beverages on the market, but I say I know of some of the 150, meaning thereby a large number. I have no idea how many I know of. All of those that have come under my observation are of the same color as 'Coca-Cola.' I could not tell you whether or not they all taste similar to Coca-Cola, because I have never tasted any except the 'Carre-Cola.' (Rec., 541-542). \* \* \* I understand you to mean by cola drink, a drink that is similar in color, taste, and appearance to 'Coca-Cola.' Any recognized cola drinks, or any that have been advertised, are the only ones I have heard the public call for. I know there are quite a number of them, among which are 'Afri-Cola' and 'Gay-Ola.' \* \* \* I have also heard the public ask for 'Lime-Cola.' That is a soda fountain drink put up by Park-Davis & Co., of Detroit. (Rec., 542). \* \* \* I do not believe I could tell you the difference between it and 'Coca-Cola' in color." (Rec., 543).

G. H. UPCHURCH, president and manager of the Bienville Pharmacy, Mobile, Ala.:

"The color of these other cola drinks which I saw was similar to 'Coca-Cola'—they are similar in color to 'Coca-Cola.' It is pretty hard for me to recall right at the present time the different cola beverages I have seen which are similar in color to 'Coca-Cola.' I have seen samples of 'Afri-Cola,' and of 'Dope' and 'Koke,' and I have seen samples of others which I cannot recall at the present time—one was made in Birmingham, I think, that I have seen samples of, but I do not remember the name of it. I do not know whether it was 'Rye-Ola' or not,—I think that was the name. I have seen samples of 'Wise-Ola.' That is made at another place, I do not know whether that is made at Birmingham, or not, but I have seen samples of it." (Rec., 526).

T. M. MURPHY, a detective in the employ of the Coca-Cola Company:

"Well, I have no first hand knowledge as to how many concerns there are making drinks similar to 'Coca-Cola,' but what knowledge I have was gotten at a picture show at Camden, Ark. I saw an advertisement stating there were 156" (Rec., 509).

F. M. GREEN, a retail druggist, Atlanta, Georgia:

"I do not know how long I have been handling

'Hires' root beer, but it has been ten or twelve years, though, any way. Yes, sir, we handled root beer before that—the one that we made ourselves. \* \* \* The color of the sarsaparilla we handled was a brown color. (Rec., 452). \* \* \* I have seen 'Moxie,' and that is a deep brown color. \* \* \* Root beer and sarsaparilla are colored with caramel. (Rec., 453). \* \* \* I know a number of drinks on the market to-

day of substantially the same color, taste, and appearance as 'Coca-Cola.' (Rec., 454). \* \* \* I do not know how many such drinks there are on the market. 'There might be a dozen, I do not know.' (Rec., 455).

LINTON L. STEPHENS, soda dispenser and cigar clerk, Atlanta, Ga.:

"I have seen several drinks on the market similar to 'Coca-Cola'—'Ko-Nut,' 'Afri-Cola,' 'Cola-Ade.' 'Ko-Nut' looks like something similar to 'Coca-Cola' and root beer. I do not know that I have ever tasted it." (Rec., 486).

J. W. HUGGINS, a Coca-Cola bottler, Murfreesboro, Tennessee, who formerly bottled a product which he labeled Koke:

"The first product we bottled and labeled 'Koke' was, I think, 'Nerve-Ola,' but we have bottled several different things that we branded 'Koke'—several of these different cola drinks. What we got from the 'Nerve-Ola' people was the completed syrup. It looked like 'Coca-Cola,' and tasted pretty much like 'Coca-Cola.'" (Rec., 2012-2013).

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Company:

"Yes, in my experience as a traveling man visiting drug stores and soda fountains over the country I have observed other beverages dispensed from soda fountains of a similar color to 'Coca-Cola.' 'Koke' and 'Dope,' has a similar color to 'Coca-

Cola.' 'Gay-Ola' has a similar color, and I have seen several on the market that had a similar color. (Rec., 342). \* \* \* I have seen a product on the market known as 'Afri-Cola,' that has a similar color to 'Coca-Cola.' (Rec., 343).

ASA G. CANDLER:

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir, I think I have seen it—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. (Rec., 383). \* \* \* Yes, sir, there is a 'Ko-Nut'—that is run by the same gang, I think. \* \* \* I understand that Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut.' I do not know, but I think that have been making it ten or twelve years." (Rec., 384).

CHARLES HOWARD CANDLER:

"Yes, sir, I know the firm of Hagan & Dodd. \* \* \* Yes, sir, they have made a drink called 'Ko-Nut.' \* \* \* I have not seen much of the 'Ko-Nut' for three or four years, I do not think. \* \* \* No, I do not know how many soft drinks there are on the market today that are about the same color as 'Coca-Cola'—that same general line of color—caffeine or cola drinks. I never thought of it." (Rec., 398).

DAVID G. WISE, a retail druggist, Atlanta, Ga.:

"Yes, sir, I have seen 'Afri-Cola.' Why, I do not know how long I have known it,—five or six years, I think. It was brought to me and offered for sale. It looked like 'Coca-Cola.' \* \* \* I tasted, of course,

to a certain extent like 'Coca-Cola.' \* \* \* 'There is a similarity. (Rec., 475-476).

CHARLES KINGSBERRY, in the cigar and soda water business, Atlanta, Georgia:

"You ask if I know any other soda fountain drinks of the same color as 'Coca-Cola;' why, 'Coca-Cola' looks something like the color of root beer, I suppose, and sarsaparilla. \* \* \* Root beer and sarsaparilla are the only other drinks that I have ever seen that have that color. \* \* \* I have seen 'Ko-Nut,'—I used to drink it at the ball park when I could not get 'Coca-Cola,' years ago. 'The color of 'Ko-Nut' is something like the color of 'Coca-Cola.' \* \* \* Yes, sir, it is pretty close to 'Coca-Cola.'" (Rec., 467).

PETE VERGE, soda water and cigar business, Atlanta, Georgia:

"There used to be a Nova-Cola Company that made 'Nova-Cola,' located on Mitchell Street across to my place. They used to be in Rome, Ga., and I think they are there now, if I am not mistaken. The color of it was the 'Coca-Cola' color. \* \* \* It looked like 'Coca-Cola,' of course, the color." (Rec., 490).

W. L. SAMS, traveling salesman of the Coca-Cola Company:

"Yes, sir, I have seen 'Moxie' and it is similar in color to sarsaparilla and root beer." (Rec., 337).



NICK D. CHOTAS, in the cigar and soda water business, Atlanta, Ga.:

"I dispense at my soda fountain, besides 'Coca-Cola,' \* \* \* 'Hires' root beer,' \* \* \* The color of the root beer which I dispense is black—well, very like 'Coca-Cola.' \* \* \* 'Hires' root beer is more like 'Coca-Cola,' more the color of 'Coca-Cola.' Well, I do not know whether or not it would be very hard, or, in fact, impossible, unless yu made a very careful examination of the two colors together, to tell whether a drink was 'Coca-Cola' or 'Hires' root beer,—by the color you can't." (Rec., 448-449).

GEORGE ALFRED HARBOUR, proprietor of Harbour's Smoke House, Atlanta, Georgia:

"Well, yes, I have seen other drinks on the market similar to 'Coca-Cola' in color; you might say 'Hires' root beer is similar to a certain extent in color." (Rec., 458).

I. L. JAMES, a retail druggist, Atlanta, Georgia:

"You ask what other drinks are on the market that are similar to 'Coca-Cola' in color. Well, root beer resembles 'Coca-Cola,'—foams a little more,—and sarsaparilla—of course, sarsaparilla and root beer are similar. \* \* \* Yes, sir, I have made root beer myself. Why, we colored it with burnt sugar,—caramel,—if we colored it at all. \* \* \* Well, I do not know what is the difference in color between a glass of root beer or a glass of sarsaparilla as served at a soda fountain and a glass of 'Coca-Cola.' 'Coca-Cola' might be a shade lighter, I don't know. Yes, sir, it is very hard to tell the difference. No,

I do not think the ordinary customer, coming in, if he saw a glass of one and a glass of the other sitting on the counter, could tell the difference between them." (Rec., 461-462).

JOHN MEHOS, in the cigar, soda fountain, and restaurant business, Atlanta, Georgia:

"You ask if I have handled anything else besides 'Coca-Cola' of that same color since I have been in business in Atlanta; root beer, you know, and sarsaparilla are drinks of that color." (Rec., 512).

T. C. LUPTON, manager of the Coca-Cola Bottling Works, Dallas, Texas:

"We bottled 'Iron Brew' last year. \* \* \* No, sir, it is not a 'Coca-Cola' product. Yes, sir, we did put it up in 'Coca-Cola' bottles. (Rec., 778). \* \* \* Iron Brew is about the color of 'Coca-Cola.' " (Rec., 779).

A. B. FREEMAN, manager of the Coca-Cola bottling plant, New Orleans, La.:

"Q.—I asked you, 'Isn't it true that you, yourself, bottled "Grapine" and sarsaparilla in your "Coca-Cola" bottles?' You answered, "We have not bottled any other things in them for the last two and a half to three years;" that is the correct answer, wasn't it? A.—Yes, sir, and I reiterate that. And that meant that I had bottled other things anterior to the last two and a half to three years, and the qualification as to 'Grapine' that I now make is that we put sarsaparilla in such bottles and not 'Grapine,'

because it was not then on the market. My recollection is that 'Grapine' was first put on the market at the beginning of last year—possibly last fall. That is not a 'Coca-Cola' product. That is put up by the William A. Abbott Co., of Los Angeles. It is about the same color as sarsaparilla and 'Coca-Cola.' \* \* \* It is about the same general appearance and color." (Rec., 644).

## 4

**The Ineviable Conclusion.**

HENRY BOERGER (Rec., 968):

"I would not know a glass of 'Coca-Cola' if I saw it by its color, because there are other drinks of the same color besides,—for instance, root beer and these cola drinks, sarsaparilla. \* \* \* I would not know a glass of 'Coca-Cola' by its taste, because there are other drinks that taste similar to it."

R. F. ZIMMERMAN (Rec., 980):

"I could not distinguish a glass of 'Coca-Cola' by its color, because there are plenty of drinks of the same color, so far as that goes. I could not say whether it was 'Coca-Cola' or not, because it was colored that way." (Rec., 980).

M. J. COSTELLO (Rec., 1000):

"I could not distinguish a bottle of 'Coca-Cola' by its color,—by the color of the drink inside of it." (Rec., 1000). \* \* \* If some one set them out for me, I might not know whether it was 'Tru-Cola,' or 'Koke,' or 'Coca-Cola;' I do not think I could tell the difference, myself." (Rec., 1002).

E. W. FREEMAN (Rec., 974-5):

"I do not believe I could distinguish a glass of 'Coca-Cola' from any other drinks, or dopes, whatever they call them, if you set three or four of them out in a glass on a table I do not believe I could

distinguish 'Coca-Cola' from 'Koke,' or 'Maud Muller,' or anything like that. (Rec., 974). \* \* \* I have also handled in my place of business sarsaparilla, and root beer,—Hires root beer and sarsaparilla. I have known of those drinks for years. \* \* \* I do not know whether I could tell a glass of sarsaparilla, or a glass of 'Coca-Cola,' or a glass of 'Koke,' or a glass of 'Ala-Cola,' or anything,—set them out there, I do not know, I do not believe I can pick them out just in a glass, they are colored so much alike. \* \* \* I have handled a number of different kinds of beer. I do not see but very little difference in the color of the different kinds." (Rec., 975).

J. M. WHEELER (Rec., 972):

"I would not know a glass of 'Coca-Cola' by its color, and I could not swear that I could tell it by its taste. Cola beverages are similar in taste, color and appearance."

A. F. ENSINGER (Rec., 984-6):

"I would not know a glass of 'Coca-Cola' by its color. Those are all about the same color. I never could distinguish one from the other by the color of it, and they all taste pretty much alike,—there is so little difference in it I could not distinguish them. (Rec., 984-985). \* \* \* I expect I have handled all the different brands of beer there are in this market. With the exception of dark beers, the light beers, you cannot distinguish one from the other, hardly. It would be an easy proposition to serve a fellow one brand of beer if he asked for another, if you were serving out of the keg." (Rec., 986).

W. F. BOYLIN (Rec., 1076):

"If I saw a glass of 'Coca-Cola' served at a fountain I could not distinguish it from any of the other cola beverages I have seen by its color. I could not distinguish it by its taste." (Rec., 1076).

C. H. JOUETTE (Rec., 1052):

"I could not distinguish a glass of 'Coca-Cola' from the other cola drinks that I have known of. I could not tell the difference in color or taste, and personally, so far as I am concerned, it would not make any difference, so they gave me a cola drink."

A. W. STANLEY (Rec., 1004):

"I could not distinguish a bottle of 'Coca-Cola,' by the color of the drink, from these other drinks."

C. P. EMBREY (Rec., 1019):

"I could not distinguish a glass of 'Coca-Cola' by its color. I could not distinguish a glass of 'Coca-Cola' from a glass of root-beer—both are dark brown."

BURTON JONES, proprietor of a retail drug store, Chattanooga (Rec., 1006):

"I dispense cola drinks—'Coca-Cola' and 'Tru-Cola.' The color of 'Tru-Cola' syrup is a brown liquid, about the same as 'Coca-Cola.' I could not distinguish the difference in color between 'Tru-Cola' syrup and 'Coca-Cola' syrup. I could not dis-



tinguish the difference in color between the finished drinks as served at the fountain and 'Coca-Cola.' I could not distinguish the difference in taste between 'Tru-Cola' and 'Coca-Cola.' "

R. L. WAYMAN (Rec., 1014) :

"I do not think I could tell a glass of 'Coca-Cola' from these other drinks by the color of it. \* \* \* Cola drinks taste almost alike,—that is, I could not tell the difference." (Rec., 1016).

JOE QUINN (Rec., 992) :

"I could not distinguish a glass of 'Coca-Cola' from a glass of root beer by the color. \* \* \* I could not distinguish a glass of 'Coca-Cola' by its color. I could not tell one from the other, both have the same color, a dark sort of color."

## SCHEDULE VI.

### The Color of the Barrel.

#### 1

**DEFENDANTS, AND THEIR PREDECESSORS, HAVE USED BARRELS OF THE SAME COLOR AS THOSE THEY NOW USE SINCE 1888.**

J. C. MAYFIELD, Sr. (Rec., 1641-2):

"I have painted our barrels red because that is the color Dr. Pemberton used—we naturally took over that color,—and, further, from the fact that it is the cheapest paint you can buy, and one coat is sufficient for painting a barrel. There is no reason why we should change. The cola drink manufacturers paint the barrels and kegs containing their syrups red, except 'Gay-Ola.' In the last year or two I have noticed theirs is a little different color—I have seen one or two possibly—but all the rest are red."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co., and for 22 years its secretary; also a stockholder in the Pemberton Chemical Co. in 1886 and 1887 (Rec., 357):

"Yes, sir, from July to October or November, 1887, 'Coca-Cola' was his (Pemberton's) principal product. \* \* \* The thing he was pushing all the time was 'Coca-Cola.' I remember there were very few barrels shipped at that time, but I think *they*

*were the same color as now,—they were painted red."*

A. O. Murphy, of Barnesville, Ga., the only surviving partner of the old Pemberton Medicine Co., except J. C. Mayfield, in speaking of the barrels and kegs in which the Pemberton Medicine Co. shipped "Coca-Cola" from January 14th, 1888, to April 14th, 1888, and in which they thereafter shipped "Yum-Yum" and "Koke," said: (Rec., 1284):

"Those barrels and kegs, to my recollection, were painted *just common red*."

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased (who was one of the original partners in the Pemberton Medicine Co.) speaking of the receptacles in which the Pemberton Medicine Co. at first shipped "Coca-Cola," and then, later on, "Koke," said (Rec., 1263):

"They had little kegs, I should call them, for shipping it out. *They were painted red*."

STEVE T. MAYFIELD, eldest son of J. C. Mayfield (Rec., 1457):

"At that time [1892] I was about nine years old, and I was in school in Atlanta, and on Saturdays I would go down to the place where they were engaged in the manufacture, and I remember on one occasion *I got a lot of red paint on my clothes,—I was fooling around the kegs,—*and used to get sugar down there and take it home and make candy."

T. C. BANKS, brother-in-law of E. H. Bloodworth, deceased, at whose house in Atlanta Bloodworth resided while connected with the Pemberton Medicine Co., said, in speaking of the Pemberton Medicine Co. (Rec., 1409) :

"They did not make 'Coca-Cola' very long. I went down to their place of business during the time they were making that. They were selling it, shipping it around and selling it to the soda fountains. They put it in small kegs and jugs that I saw. *The kegs were painted red.*"

L. A. HOLLEY, says that in about 1892 (Rec., 1275) :

"I went through his [Mayfield's] place with him. The receptacles, as I remember, were kegs,—possibly some jugs. \* \* \* These kegs were painted red."

C. H. CRIMM, an insurance man, who met J. C. Mayfield in Atlanta in 1897, and who had an office next to his in the Norcross Building there, says that at that time Mayfield was manufacturing "Wine of Coca" and two other drinks of a similar nature and color. (Rec., 1040). He says that Mayfield had his manufacturing plant at the corner of Forsythe St. and Trinity Ave. at that time, and that he (Crimm) visited this plant frequently and saw Mayfield engaged in manufacturing these syrups (Rec., 1043-4). He further says (Rec., 1041) :

"I noticed barrels and kegs in his place of business. *The color of those barrels and kegs was red,—dark red.*"

GEORGE R. EDMONDSON, proprietor of two drug stores in Atlanta, says that he first met J. C. Mayfield about 17 or 18 years ago, in Atlanta,—about 1898 or 1900; that Mayfield at that time was engaged in the manufacture of a soda fountain extract similar to "Coca-Cola;" that he purchased some of that extract from Mayfield for several months before he left Atlanta, and continued to purchase it after Mayfield went to Birmingham. (Rec., 1299). In speaking of the receptacles in which the syrup was shipped, he said (Rec., 1299):

"The syrup came to us in little kegs,—possibly five gallon kegs. I think *they were painted red*,—that is my recollection."

P. B. MCGRAW, a bottler at Gadsden, Ala., says he has been bottling "Koke" ever since 1900 (Rec., 1313), and that (Rec., 1315):

"The syrup would come to me about 28 gallons, and up as high as 40 and 42 gallons, in a barrel. *The barrels were painted red.*"

C. N. BAKER, a bottler at Newman, Ga., says that he began to bottle "Koke" "along in 1900 and something,—it has been a good while ago,"—and that (Rec., 1406):

"The syrup came to me in kegs, or half barrels. I do not know which now. *The containers of all the colas I ever received were red.*"

J. W. MAYFIELD, son of J. C. Mayfield (Rec., 1518):

"I went to Birmingham in 1898 or '99. I was in the syrup business then, making 'Koke,' 'Celery-Cola,' 'Pepsi-Nola,' and in the bottling business. I helped my father in that business. I did practically all the bottling, after I learned how, and did a lot of mixing, *painted the kegs*, and acted as shipping clerk. *I painted the kegs red.*"

OLIVER PRINCE (Rec., 1319):

"I worked for J. C. Mayfield about 1903 and '4, washing bottles, *painting kegs*," etc. "That was at South 20th St., in Birmingham. *I painted the kegs red.*"

G. W. FREEMAN (Rec., 1327):

"I knew J. C. Mayfield pretty well,—that was 1903,—'2, '3 and '4,—right along there. \* \* \* I knew him on the South side,—20th St., right by the A. B. & A. depot. My place of business was just across the street from him. \* \* \* I had occasion to go across to his place of business a good deal,—I was over there frequently. \* \* \* I saw some barrels and kegs over there. It seems to me *they were painted red.*"

MRS. M. L. EDWARDS (Rec., 1336-7):

"I knew J. C. Mayfield. 'The first bottle of 'Koke' that I sold I bought from him in 1903, in East Thomas. At that time he was here in Birmingham. I had a little grocery store with drinks and fruits



at that time, at East Thomas, about 3 miles from Birmingham. Mr. Mayfield's place of business was on Morris Ave., between 20th and 21st at that time.

\* \* \* I went down to Mr. Mayfield's place of business a number of times. *They had lots of little red kegs around there.*"

A. S. JOSEPH (Rec., 1330-1):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks, and shipping 'Hop Ale.' \* \* \* I had occasion to go to Mr. Mayfield's place of business frequently \* \* \* owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of one hundred packages, of 'Hop Ale,—delivering it, and, later, collecting on it. \* \* \* I noticed a good many receptacles sitting around in his place of business when I was in there. *His packages were painted red.* \* \* \* Mr. Mayfield continued manufacturing and selling that product 'Koke' during the time that I knew him,—from 1900 to 1907, when the brewery went out of commission."

W. B. ARNOLD (Rec., 1308):

"I knew J. C. Mayfield,—first knew him the latter part of 1905 down here on Morris Ave., Birmingham, Ala. He was engaged in the bottling business at that time, manufacturing 'Koke' and different drinks. \* \* \* I went into the place where he was making this stuff,—into his factory down on Morris Ave. *I saw the syrup in barrels painted red.* \* \* \* In 1908 and 1909 I ran a soda fountain in the Hippodrome skating rink on Third Ave.

'Koke' was the only cola drink I dispensed. \* \* \* It came to me in little red barrels,—5 and 10 gallon barrels. *They were painted red.*"

CHARLES W. BURTON (Rec., 1323-4):

"He [J. C. Mayfield] was in business then [1906-7] on Harris Ave., between 21st and 22nd, here in Birmingham. I have been to his place of business frequently. I have seen him put up his syrup,—seen him have little kegs sitting around there, *little red kegs.*"

E. D. MONTGOMERY (Rec., 1357):

"I know J. C. Mayfield. I knew him here in Birmingham. \* \* \* I was with him in 1908 in business, in his employ in 1908. I was what you could call, I reckon, a general man around the plant, in the shipping department, filling orders, and one thing and another,—bottling. Mr. Mayfield was making several different drinks. \* \* \* He shipped syrup out to the trade. He shipped it in bottles and also in kegs. *The kegs were generally painted red.*"

A. F. WATKINS (Rec., 1377):

"I knew Mr. Mayfield,—first met him right here in the City of Birmingham. He was engaged in the bottling business,—manufacturing syrups. \* \* \* I was over to his place of business quite a good deal. I saw barrels, kegs, and stuff of that kind. *They were painted red.*"

## 2

PRACTICALLY ALL THE OTHER COLA SYRUPS ARE MARKED IN BARRELS PAINTED THE SAME COLOR AS PLAINTIFF'S AND DEFENDANTS' BARRELS.

**(a).—Testimony of Defendants' Witnesses.**

LEE HAGAN, of the Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1293):

"The barrels and kegs we ship our product in are painted red. I believe we have always used red paint. We had to paint them some color, and that is about as cheap a paint as you can buy. It is the most durable and attractive."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1090-1, 1098):

"In shipping my syrup, we ship it in barrels and kegs. They are usually red. \* \* \* We paint our barrels that color because, in the first place, it is cheaper, I reckon, and, in the second place, the color of the barrels that nearly all syrups are sold in,—red barrels,—all syrups I have seen on the market, except 'Gay-Ola.' I think probably they had to change their barrels' color on account of some court decision. (Rec., 1090-1091). \* \* \* I would not know a 'Coca-Cola' barrel by the red color. I did not know that the Coca-Cola Co. specifically had a patent or trade-mark on the color of their barrels. I never had heard of it. I buy the cheapest paint I can get." (Rec., 1098).

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks and manufacturers of "Star Cola," Nashville (Rec., 1084, 1088):

"We have shipped syrups in red barrels. When we were doing all of our own painting we painted them red because red paint was the cheapest. We get 'Digestol' and other drinks—'Jersey Creme,' and things like that—frequently in red barrels. I would know a 'Coca-Cola' barrel by the *head*—they have a *large paper label* that they paste on the head of a barrel—but I would not know a 'Coca-Cola' barrel by its *color*. \* \* \* If there was *no label* on the barrel, I could not tell the 'Coca-Cola' barrel from any other barrel. (Rec., 1084). \* \* \* Red paint was less expensive than any other kind, that was our experience. \* \* \* The painter told us that red paint was the cheapest at the time." (Rec., 1088).

J. M. WARREN, president of the Warren Paint & Color Co., Nashville (Rec., 1166-9):

"I have sold paint to the Koke Companies. \* \* \* I have sold them red barrel paint. This paint I sold them has no regular name, only it is a standard red, universally used by all concerns who have use for paint on barrels and packages of that sort. It is the cheapest paint you can buy, because the ingredients that go to make it up are the cheapest,—red oxide of iron, and, of course, oil. That has been a standard paint ever since I can remember,—oh, 18 years. That paint has been used mostly for painting barrels, and cooperage, and things of that kind. I sell it to all classes and trades,—any one that uses packages and barrels, we sell that paint to. I should judge 75 per cent of all paint that is used for bar-

rels is red, because it gives you more universal satisfaction and is cheaper paint. There is a paint known as 'Coca-Cola Red.' 'Coca-Cola Red' is a very expensive red, used mostly, from my knowledge, in painting *signs, bulletin boards, things like that*. We have matched some paint called 'Coca-Cola Red' sold to the local *sign men* here in town doing *sign work* for the Coca-Cola Co. This 'Coca-Cola Red' is a more expensive paint than this other one, because it is a very durable red, a brighter shade, and a special shade. There is no comparison at all between the red paint I sell the Koke Companies compared with the color of 'Coca-Cola Red.' One is a very bright vermillion, and the other is a mineral paint; one is a manufactured article, and the other a mineral dug out of the ground. The high priced or 'Coca-Cola Red' is a manufactured and chemical paint,—the color is made from chemicals. A barrel painted 'Coca-Cola Red' and another of the cheaper grade would look entirely different—you could distinguish them in a minute. 'Coca-Cola Red,' as I know it, is a very bright shade of vermillion, and the other is what we call 'English Venetian Red,'—very much darker shade. \* \* \* 'Coca-Cola Red' is a true shade and has a good rich tone to it, whereas the other has a muddy color. \* \* \* The 'Coca-Cola' people use on their *barrels* the regular *standard 'English Venetian'* paint. They do not buy from us, but it is the same kind of red all manufacturers use—they look alike, and I could not tell the difference between them. They *do not* use 'Coca-Cola Red' on the *barrels* to my knowledge. [Compare, for instance, the color of *Defendants' Exhibits 278 and 279*, two Coca-Cola kegs, with the color of *Plaintiff's Exhibit 17*, an enameled metal sign board used in advertising "Coca-Cola." ] \* \* \* Our repre-

senative called on the Central Koke Co. at Chattanooga and in the conversation told him what kind of paint we had, etc., and he bought five gallons to try. Nothing whatever was said about the *shade*, he just bought five gallons of our *standard red barrel paint*, and we sent it to him, and since that time have been getting the orders. The *price* was the reason he bought from us, probably. I think it was *cheaper* than the paint he had bought before."

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., and bottler of "Fletcher's Cola" (Rec., 1199):

"I have bottled other cola drinks. I have bottled 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'My-Ola,' 'Star-Cola,' and bottled other drinks. \* \* \* The color of the barrels I get the cola drinks in I am now bottling is red. I have gotten different cola drinks in red barrels. 'Gay-Ola' was in red barrels when we bottled it, if I am not mistaken. 'Coca-Nola' was in red barrels, I am quite sure. Diehl's 'Star-Cola' is in red barrels. Almost all cola drinks I have bottled come in red barrels."

C. N. BAKER, bottler of soft drinks, Newman, Ga. (Rec., 1406-7):

"I could not name all the different colas I have bottled. \* \* \* The containers of all the colas I have ever received were red. \* \* \* The syrups for all these different drinks came in barrels and kegs. They were painted red."



C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss. :

"I have sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Luck-Ola.' (Rec., 1759). \* \* \* These various cola syrups come in red barrels and kegs. I never got a syrup or an extract for a cola beverage that did not come in a red barrel or keg." (Rec., 1760).

DR. H. O. NULL, a practicing physician and retail druggist, Chattanooga (Rec., 1063) :

"The syrup for the different cola drinks come in just ordinary barrels, so far as I have noticed them, all painted red. I do not believe I could tell a 'Coca-Cola' barrel, by its *color*, if I did not see the *label* on the barrel. \* \* \* I do not think I could distinguish it, by its *color*, from the barrels in which other syrups have been shipped. I do not think there is any difference in them."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004-5) :

"I do not know as I could tell a 'Coca-Cola' barrel if I saw it, because a great many other barrels are the same color. \* \* \* We used to get Catawba wine in barrels painted red."

A. F. ENSINGER, bartender, Chattanooga (Rec., 986) :

"I would not know a 'Coca-Cola' barrel if I saw it, *unless it was labeled*. I used 'Coca-Cola' barrels for about five or six years, but I did not see any

difference in the barrel from that of any other barrel, *unless there is a label on it.* \* \* \* I could not tell any difference in the *color.*"

F. M. BOGART, a drug clerk and soda dispenser, Chattanooga (Rec., 1070):

"We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' The syrups for the different drinks come in barrels. The color of the barrels is red. \* \* \* I do not know as I could tell a 'Coca-Cola' barrel from the other barrels,—if I could not see the *label* on it,—by its *color.*"

WILLIAM F. DAVIS, president of the Davis-Fuston Drug Stores, Nashville (Rec., 1103):

"These different cola drinks we buy sometimes in barrel lots, some times in half barrels, and occasionally in five gallon containers. The color of the barrels the different drinks come in is a red,—muddy reddish color."

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville (Rec., 1119-20):

"I have dispensed 'Fletcher's Cola' 'Diehl's 'Star-Cola,' and some other names. I do not remember the names of them. I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. \* \* \* Other cola syrups come in red barrels."

J. C. PRICE, proprietor of a restaurant, but formerly a soda dispenser, Nashville (Rec., 1205-1207-8) :

“There are many different brands of cola drinks I have served. I could not call them all, I know a few: ‘Arrow-Cola,’ ‘J. D. F. Cola,’ ‘Koke,’ and ‘Cola,’ ‘Gay-Ola,’ ‘Afri-Cola,’ \* \* \* ‘Star-Cola,’ and ‘Gersts’ Cola,’ too, and ‘Coca-Cola.’ (Rec., 1205). \* \* \* These various cola drinks I have referred to most all came in red barrels. The Coca-Cola Co. had a barrel that was very close to it, the paint was. \* \* \* I do not think I could tell the difference just at a glance.” (Rec., 1207-8).

H. F. CRISLER, retail druggist, Jackson, Miss. (Rec., 1430) :

“The only three syrups I have handled were ‘Ko-Nut,’ ‘Dope,’ and ‘Coca-Cola.’ They all came in red barrels.”

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, Tenn. (Rec., 969) :

“The color of the barrel the ‘Gay-Ola’ syrup came to me in was red. I think the color of the barrel the ‘Star-Cola’ syrup came to me in was red.”

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, which bottles “Tru-Cola” (Rec., 981) :

“We get the syrup [‘Tru-Cola’] from the National Syrup Co., then we bottle it. It comes in a kind of reddish barrel,—supposed to be red, I think.”

BURTON JONES, a retail druggist, Chattanooga (Rec., 1006):

"We get 'Tru-Cola' in a red barrel,—the syrup comes in red barrels."

C. P. EMBREY, a retail druggist, Chattanooga (Rec., 1019-20):

"[The] cola syrups I have handled come in red barrels. \* \* \* I could not tell a 'Coca-Cola' barrel if I saw it *and did not see the label* on the end of it, because they are all colored red, about the same thing."

J. M. WHEELER, a bartender, Chattanooga (Rec., 972):

"I would not know a 'Coca-Cola' barrel if I saw it, unless there was *lettering* on it."

R. L. WAYMAN, a bartender, Chattanooga Rec., 1016):

"I would not know a 'Coca-Cola' barrel if I saw it. All I would go by would be the *name* on it."

R. K. SMITH, head dispenser at the United Cigar Stores Co., Nashville (Rec., 1190):

"I could tell a 'Coca-Cola' barrel, *if it was labeled 'Coca-Cola.'* \* \* \* I have not seen the wagons delivering syrups to the soda fountains around town. It is not customary in this city for soda

fountain people to leave their empties sitting out on the sidewalk in front of their places."

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"I have not noticed barrels of 'Coca-Cola' sitting on the sidewalk in front of soda stands around town."

### **(b).—Admissions of Plaintiff's Witnesses.**

FREDERIC CONWAY PEACE, an ex-Pinkerton detective, employed by the Coca-Cola Co. to help work up this case (Rec., 2213-16):

"Yes, sir, I have gone around investigating the barrels at different soda fountains to see what dealers were handling. You asked me how many different kinds of cola drinks I have discovered in barrels at the different soda fountains I have been to; why, 'Ko-Nut,' and 'My-Coca' are the two principal ones—'X-O,' that is another one. I understand it is made in Baltimore, or some place in Virginia. \* \* \* I am very familiar with the 'Ko-Nut' barrels and 'Koke' barrels. \* \* \* I notice all the barrels particularly, but these are the most prominent ones. I have seen barrels in which 'My-Coca,' 'Wise-Ola,' and 'Rye-Ola' is shipped, and I was able to tell the difference between these various barrels and 'Coca-Cola' barrels *because 'Coca-Cola' barrels were always labeled 'Coca-Cola'*—great big labels on either end. (Rec., 2213). *That is the only way I could tell the difference between them.* \* \* \* 'Wise-Ola' barrels and the barrels used by the Southern Koke Co. are the same color practically speaking, as the 'Coca-

Cola' barrels, and so are the 'My-Coca' barrels, but the 'My-Coca' barrels bear a great big label, almost as large as the 'Coca-Cola' labels. All I ever saw of them were labeled 'My-Coca.' (Rec., 2214). \* \* \* Yes, sir, I have seen 'Koke' barrels in railroad stations. You ask if I recognized them right off as 'Koke' barrels; \* \* \* I could not tell whether they were 'Koke' barrels or whether they were *some other kind of syrup barrels*. I recognized them as *syrup barrels*. They looked like *the standard syrup barrels used for syrups*." (Rec., 2215-2216).

HOKE SMITH LEIGH, a traveling salesman in the employ of the Coca-Cola Co. (Rec., 2235-6):

"No, sir, I could not tell by looking at the barrel I thumped—the substitute barrel—what kind of barrel it was, because I do not recall that it had any *label* on it. You ask if it requires a *label* to distinguish the barrels one from the other in my mind; well, if there is any doubt. You ask if there is ever any room for doubt, and if I ever ran across an occasion to doubt, except from seeing the *labels*, or the absence of it; I see a lot of red barrels that do not have labels and I always doubt it right away. You ask if I could tell the difference in the barrels, except by the *labels* on them; I generally know. The boys in the factory mark them with a black mark, and I sometimes distinguish them *that way*, but *I look to the label more than anything else*. You ask if, aside from the *marks* and *labels*, there is any way to distinguish one from the other; I do not know. \* \* \* When in doubt it will be settled in my mind by the 'Coca-Cola' label. You ask if I can distinguish the *color* of the 'Coca-Cola' barrel from all these other barrels; I did not say necessarily it could



be done. \* \* \* You ask if I could tell, just by looking at the barrel, *without seeing the label; not to get right down to the point of distinguishing one from the other.* \* \* \* All these substitute barrels look just about alike, all I have seen or noticed. It is pretty hard to tell one of those from the others." (Rec., 2235-2236).

CLAUDE W. HICKEL, drug clerk, Charleston, West Virginia, but formerly a soda dispenser in Ocala, Florida (Rec., 2062-3):

"The way I distinguish the 'Coca-Cola' barrels from those other barrels I mentioned is because they always *label* them. (Rec., 2062). \* \* \* The *only difference* in my mind between the barrels I have seen these *other* drinks I have mentioned come in, and the 'Coca-Cola' barrels, is that the 'Coca-Cola' barrels that came to the Post Office Drug Store were all *labeled*—they had big labels on the head of the barrel. Why, yes, *that was the only way I could tell the difference between the 'Coca-Cola' barrel and the barrels containing these other drinks.*—they were very similar." (Rec., 2063).

CHARLES KINGSBURY (Rec., 466):

"The way I distinguish a 'Coca-Cola' keg is that *it has a great big name on it.—'Coca-Cola.'* No, I don't know that I could distinguish it *in any other way*, or that I could distinguish it by its *color.* \* \* \* The reason why I know it when I see it is *because it has 'Coca-Cola' on it.*"

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Co. (Rec., 344):

"Yes, I have noticed the kinds of barrels that 'Ko-Nut,' and 'Afri-Cola' are shipped in—in fact, it is just as near an imitation of the 'Coca-Cola' barrel as they could get, so far as I could see,—a red barrel, minus the label. Yes, I have seen other so-called cola beverages, or caffeine-containing soda fountain beverages, shipped in barrels of the same color as 'Coca-Cola.' "

J. F. REDING, a retail druggist, Atlanta, Ga. (Rec., 480):

"Yes, sir, I have seen red barrels, other than 'Coca-Cola' barrels. I do not recollect where I have seen them, but I have seen red barrels, though."

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir, I think I have seen it,—I know I have. \* \* \* It is sold in barrels whenever they can. (Rec., 383). \* \* \* Yes, sir, there is a 'Ko-Nut,'—that's run by the same gang, I think. \* \* \* Yes, sir, I think that is sold in red barrels, too,—the only way I know. I see red barrels traveling around town \* \* \* and they tell me it is 'Afri-Cola.' " (Rec., 384).

## **SCHEDULE VII.**

### **The Soda Water Bottle.**

#### **1**

#### **Physical Exhibits.**

The best evidence that the size, color, shape, design and general appearance of the soda water bottles used by plaintiff for bottling the several beverages made from its syrup do not in any wise serve to identify or distinguish plaintiff's bottles from the bottles containing the similar products of others, is the bottles themselves in which the various brands of soda water are marketed. See *Defendants' Exhibits 1, 2, 3, 4, 6, 43 to 54 inclusive, 189 to 213 inclusive, 215 to 223 inclusive; plaintiff's exhibits 153 to 160, inclusive, 187, 188 and 191; and plaintiff's rebuttal exhibits 68 to 77, inclusive.*

#### **2**

#### **Testimony of Defendants' Witnesses.**

HENRY BOERGER, president of the Chattanooga Bottling Works, Chattanooga (Rec., 967-8):

"When I first bottled 'Coca-Cola' we used the Hutchinson stopper—that is a different shaped bottle—but for the last ten years we have been using the crown stopper bottle nearly altogether. The crown stoppered bottle we have been using is the same shaped bottle that other drinks are put up in.

\* \* \* I would not know a bottle of 'Coca-Cola' if I saw it, by the color, shape or size, although some bottles are a different size from the 'Coca-Cola' bottle. \* \* \* There are lots of other bottles that have the same shape as 'Coca-Cola.' "

LEE HAGAN, of Hagan & Dodd, manufacturers of Ko-Nut and Afri-Cola, Atlanta (Rec., 1297):

"Prior to the time I bottled 'Ko-Nut,' I bottled 'Dixie;' that was put up in the old Hutchenson stoppered bottle, before the crown bottle came in use. The crown bottle came in use about fourteen years ago, I think, here in Atlanta. A good many bottles have a special shape of their own, but the bottle used by the 'Coca-Cola' people at this time is very similar to the soda bottle used twenty-five years ago by all bottlers for bottling a general line of soda water."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1093):

"I do not think I ever saw a [cola] beverage not put up in a bottle of the same general appearance and size as the one in which 'Coca-Cola' is put up. Those bottles, the color and taste of the drink, are common to the trade."

J. C. McDONALD, a bartender, Chattanooga (Rec., 1068):

"I have never seen a cola drink not practically the same color as Coca-Cola and practically the same

taste, or that was not put up in a bottle of the same general design as the 'Coca-Cola' bottle."

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga (Rec., 1004):

"These drinks were put up in bottles. They are all about the same, all black bottles. I cannot distinguish a 'Coca-Cola' bottle from a bottle of these other cola drinks that I know of, unless I saw more than that—the *name blown in the glass*. \* \* \* My recollection is that they are all about the same kind of bottle."

JOE QUINN, a bartender, Chattanooga (Rec., 991-2):

"All the different drinks I have handled and know of have been bottled. The bottles all look the same. I do not know that I could tell one from the other. I could not distinguish a bottle of 'Coca-Cola,' *without the crown on it*."

TOM COLLINS, steward of the Eagles' Club, Chattanooga (Rec., 988-9):

"If I saw a bottle of 'Coca-Cola' sitting on the counter, from the size of the bottle, the color, shape, and general appearance of the bottle, I could not tell whether or not it was a bottle of 'Coca-Cola' or a bottle containing some other cola beverage. The bottles look about the same to me,—that is, the 'Coca-Cola' bottles and the cola bottles."

A. F. ENSINGER, a bartender, Chattanooga (Rec., 985):

"The bottles of the different soft drinks I handle, compared as to size, shape, general appearance, etc., with the bottles in which 'Coca-Cola' is put up, are all pretty much the same shaped bottle and color. \* \* \* I would not know a bottle of 'Coca-Cola' by its *size, shape, color*, or its *general appearance*, *unless* I saw the *name* on it. The majority of bottles are all pretty much the same size, shape, and color, and I could not distinguish them *unless I had seen the name.*"

E. W. FREEMAN, a bartender, Chattanooga (Rec., 974-6):

"I would not know a bottle of 'Coca-Cola' by its *size, shape*, and *general appearance*, *unless it had 'Coca-Cola' blown in it*, or something like that. (Rec. 974). \* \* \* I have never seen a cola beverage that was not the same general color as 'Coca-Cola.' They generally taste about alike to me, and are put up in the same general style of bottle, color and all."

J. N. WHEELER, a bartender, Chattanooga (Rec., 970, 972):

"The size, shape, and general appearance, etc., of the bottles that these other cola beverages are put up in, compared with the 'Coca-Cola' bottle, are very much the same thing. (Rec., 970). \* \* \* I would not know a bottle of 'Coca-Cola' if I saw it, and *did not see the name of 'Coca-Cola' on the side of the bottle.* It is pretty much the same bottle as



the other cola drinks—the same shape—and, *if you do not see the lettering on it*, I do not suppose you could tell the difference. \* \* \* The size, shape and general appearance of the 'Koke' bottle used compare pretty much the same with those used generally in the trade for other cola beverages." (Rec., 972).

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"All cola drinks I have known of have been put up in bottles. The shape, size, and general design and appearance of the bottles of these other cola drinks, compared with the bottles of 'Coca-Cola' are very much alike,—there is very little difference in any of them. \* \* \* I could not distinguish a bottle of 'Coca-Cola' from these other drinks, *unless I saw the crown, or name blown in the side of the bottle.*"

W. F. STRICKLAND, a bartender, Chattanooga (Rec., 1048-9):

"These drinks are put up in bottles. The general size, shape, and appearance of the 'Maud Muller' bottle and this Zimmerman stuff I spoke of, as compared to the size, shape, and general appearance of 'Coca-Cola' bottles, all look about alike—some times the bottlers would blow their names around the top. (Rec., 1048). \* \* \* Some of the bottles have a name in them, like '*Chattanooga Bottling Company*,' but you have to get up close to read them. They are all the same size and \* \* \* look like a 'Coca-Cola' bottle. The 'Coca-Cola' bottle has '*Coca-Cola Bottling Company*' on it. I believe it is on the bot-

tom, '*Trade-Mark Registered*' or something like that—great big '*Coca*' and another '*C*', and the rest of the letters small."

LUKE POGUE, a bartender, Patten Hotel bar, Chattanooga (Rec., 1060-1):

"The name '*Coca-Cola*' is on the '*Coca-Cola*' bottle. Some of the others have names on the bottles and some do not. There is no way for our customers to know, when they come and ask for a 'dope,' the drink they are getting without it is '*Coca-Cola*.' '*Coca-Cola*' uses their own bottles, and these other coke companies—most of them use bottles they pick up, almost all of them, and you might get a case with a dozen different names on the bottles."

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1075-6):

"I do not think I have seen cola beverages put in anything except six and seven ounce split bottles. Most all I have ever noticed are dark brown bottles."

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 997):

"These cola drinks all pretty much the same thing as '*Coca-Cola*,' all in dark bottles, and all look alike.  
\* \* \* They are dark bottles pretty near the same size, and pretty near the same as the '*Coca-Cola*' bottles."

CHARLES W. BURTON, a lunchroom proprietor, formerly a bar tender, Birmingham (Rec., 1324):

"The bottles of these different cold drinks have a similarity—all about the same size, round—and I have seen them, as I say, in both clear and amber bottles, just one way and then another. In fact, I have seen mixed cases of bottles, the bottles being mixed in the case."

H. L. FISHER, engaged in the wholesale liquor business, Birmingham (Rec., 1346):

"These cola drinks are all labeled—most of them have the *name on the cap*."

C. N. BAKER, a bottler, Newnan, Georgia (Rec., 1407):

"There is no difference in the bottles of these different drinks, any way, *except the name blown on them*."

### 3

## **Admissions of Plaintiff's Witnesses.**

CHARLES HOWARD CANDLER, vice-president and general manager of the Coca-Cola Co. (Rec., 396):

"The Coca-Cola Co. first began to make bottling syrup in 1898, and that is when 'Coca-Cola' first began to be bottled."

H. B. PIERCE, chief detective for the Coca-Cola Co., in charge of working up the facts in this case (Rec., 2136, 2130-2, 2140-1):

"Sure, I know a 'Coca-Cola' bottle when I see it. No, *it is not a distinctive bottle*. No, *it is not distinctive*. No, 'Coca-Cola' *hasn't a distinctive bottle*,—not in its present form. It is distinctive in as much as it has the *trademark* 'Coca-Cola' blown in script in some part of the bottle, and *that is the thing that distinguishes it from all the other bottles on the market*—not *all* the bottles, there are *some* bottles that bottles that have a *different* size and shape. Rec., 2136). \* \* \* It ['Chero-Cola'] is about the same color as these other drinks, and is put up in bottles almost identical in size with the 'Coca-Cola' bottles, and has a cap on it about the same size as the 'Coca-Cola' cap, and just at a casual glance would look about like a bottle of 'Coca-Cola.' (Rec., 2130). \* \* \* I believe that 'Chero-Cola' bottles habitually have a *label* on them. 'The label is a *bright* yellow with the *name* 'Chero-Cola' on there in red. (Rec., 2131). [Same color cheme as defendants' bottle label. See *defendants' exhibit 123*]. \* \* \* All of the other cola drinks I have known of all have about the same color, and are put up in about the same kind of bottle, and have pretty much the same general taste." (Rec., 2132). I am acquainted with the size, shape and general appearance of the bottles in which 'Coca-Cola' is bottled and sold in Atlanta, Georgia. I believe it is a six and one-half ounce white bottle. I do not remember to have seen cola drinks served in bottles of any other shape besides that. Amber bottles are used by some of the bottlers of 'Coca-Cola' up in the northwest territory. \* \* \* I believe the bottlers of these various cola drinks use various sized bottles. You ask if I have ever noticed any of these cola drinks offered to a customer in bottles which differed in size, shape, and general appearance from Coca-Cola bottles; I never particularly noticed that. (Rec., 2140). \* \* \* You ask if there is any

way of telling, from the size, shape, color, design, and general appearance of the bottle, whether or not it contains 'Coca-Cola,' or one of these fourteen or fifteen drinks which I have mentioned; the licensed bottlers of 'Coca-Cola' always use the *trade-marked* 'Coca-Cola' bottles, and *that is the way I distinguish those from the other drinks.*"

GEORGE H. WILKINS, private detective from the office of Edward S. Rogers, Esq., Chicago (Rec., 887, 888, 885):

"You ask if I don't know that the bottle marked *plaintiff's exhibit No. 187*, [a bottle of 'Koke'] is about the same size and shape bottle that is used generally in the trade, in the soft drink business, for nearly every kind of carbonated soft drink that is on the market; well, no, I could not testify as to that. I don't know what bottles they have used. Until I work on a case I do not pay much attention to the exact type and size of bottles. But I know these bottles, 'Coca-Cola' and 'Koke,' are about the same as a great many bottles I have seen that do not contain 'Coca-Cola' and 'Koke.' (Rec., 887) \* \* \* Most of the soft drinks I got at Fort Worth, Dallas, and New Orleans were in this general style of bottle, but I do not know them as being 'Coca-Cola' bottles. It is a bottle similar to this bottle, *Exhibit No. 187*. ...*I do not believe I could tell, from the shape of the bottle, what was in it.* Rec., 888) \* \* \* Of course, I do not know of my own knowledge who bottled these products [Plaintiffs exhibits 187, 188, 189, and 191], only by [the] *labels on the bottles.*" Rec., 885).

GEORGE J. MARTIN, a traveling salesman in the employ of the Coca-Cola Co. (Rec., 345):

"Yes, I have drunk 'Koke'. Q. You could tell right off it was not 'Coca-Cola', couldn't you? A. Well, of course, I got it out of a '*Koke*' bottle. \* \* \* If he had given it to me, and *I hadn't seen the label on it, I don't know what I would have thought.*"

C. J. HOGAN, a Pinkerton detective employed by the Coca-Cola Co. to get up evidence in this case:

"We have produced all the 'Koke' that was offered us for 'Coca-Cola'. You say you take it for granted that we were *not deceived* when we got it; why, *sure not*. \* \* \* *Sure we knew what it was when we got it.*" Rec., 649-650).

B. J. GILLON, another Pinkerton detective employed by the Coca-Cola Co. to help work up the facts in this case:

"In each place we went to we called first for a glass of 'Coca-Cola' and they served us out of the bottle—they poured it out of the bottle into the glass—and we drank from the glass. They gave us a drink which we drank in each instance. When we drank the drink, we asked for a bottle of that drink under some circumstances, and under other circumstances we did not ask for it. In each instance I saw the drink which was served to us, in the bottle in which it was served, and, in those cases where we got the drink in a glass, I knew what the bottle contained before I drank the stuff, so I was *not deceived* at any time by what I drank. In each instance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance *I saw that it was a bottle of 'Koke'* that had been served me in the glass before I ordered it; and, in



each instance where I failed to order a bottle to take away with me, *I was satisfied it was 'Coca-Cola.'*" (Rec., 661-662).

I. B. DRAWLEY, one of plaintiff's spotters (Rec., 2150):

"We went to two stores of the Nashville Drug Co. and at both of them they served bottled 'Coca-Cola.' I knew it was bottled 'Coca-Cola' *because it had 'Coca-Cola' on the crown.* I recognized it right off as 'Coca-Cola.' "

C. C. ROSS, another of plaintiff's spotters (Rec., 2174-6):

"You ask how I know that the bottles which we got at the three drug stores mentioned were bottled 'Coca-Cola'; well, they were *labeled 'Coca-Cola,'* and had *Crowns* on them,—*'Coca-Cola,'* and *'Coca-Cola' was blown into the bottles.* Yes, sir, I have seen bottles containing other cola drinks. You ask what cola drinks; well, I have seen a great many cola drinks—I have seen several of them, for instance, 'Chero-Cola,' 'My-Coca,' 'Parafait,' 'Chas.-Cola,' 'Rivo-Cola.' I could study up some more, but that is all I can think of right now. \* \* \* No, I cannot distinguish 'Coca-Cola' from the *bottles* in which these other drinks [are bottled]. I cannot tell it by the *color.* \* \* \* If they put out sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. (Rec., 2174-2175-2176) \* \* \* You ask if the 'Coca-Cola' bottles are uniform; in some places they use a bottle like that (indicating a flint bottle) and in some places they use a dark bottle or brown bot-

tle. \* \* \* In Nashville, I believe, it is a brown bottle. Then, there is a kind of blue bottle, some of them have in some places."

NORVILLE N. LEAVER, manufacturer of "Orin-Cola," St. Louis, Mo. (Rec., 2037):

"Some 'Coca-Cola' has blue glass bottles,—green glass, rather,—and it is a little bit smaller on the top than mine. \* \* \* In my experience there is half a dozen styles on the market in the City of St. Louis." (Rec., 2037).

SAMUEL C. DOBBS, vice-president and sales manager of the Coca-Cola Co. (Rec., 323-4):

"I have seen 'Coca-Cola' bottled in eight ounce bottles and in seven ounce bottles. \* \* \* When it originally started the bottles held about eight ounces, but they have been gradually eliminated,—we have been gradually eliminating that. We had lots to learn when we started the bottling business. For the past several years the 'Coca-Cola' bottles have all been tending toward that particular shape. Oh, there have been differences in the past, yes, and it is still sold in bottles of different shapes. Some of the bottling plants are using the amber bottles, but the proportion of them is small, and it is a thing we have objected to and are rapidly getting cleaned out. \* \* \* It was not in 1911,—I think it was later,—I don't recollect now,—but there was a meeting of the bottlers held here in Atlanta to adopt a uniform bottle. \* \* \* The reason we wanted a uniform bottle was to protect ourselves against infringements. There would never have been any necessity to adopt

a uniform bottle if they had all been uniform before that."

A. B. FREEMAN, manager of the Coca-Cola Bottling Co., New Orleans, La. (Rec., 642-5):

"Mr. Hirsch asked me, as I understood the question, if *plaintiff's exhibit 111* \* \* \* was a 'Coca-Cola' bottle. I replied that it was, \* \* \* as used by us. (Rec., 642). \* \* \* Up to the time of the 1911 convention that bottle had not been adopted. You ask if I did not testify in the '*Glee-Nol*' case that a bottle of that general shape and make had been generally used for various drinks, and that I, myself, had bottled 'Grapine' in such a bottle, and you say that you showed me a bottle, if I recollect; I could not have testified that positively, Mr. Dart, because that particular bottle was a result of this conference between the bottlers and the Coca-Cola Co. that you refer to—that bottle was not in existence before-hand. Yes, sir, it is true that a bottle bearing the label 'Coca-Cola' had been generally used by our bottling company, anterior to the convention of bottlers which I speak of in 1911, for bottling other drinks than 'Coca-Cola,' but not that particular bottle, because that particular form and shape of bottle was adopted by that convention, \* \* \* You say you showed me a bottle of 'Grapine' during the '*Glee-Nol*' trial, bottled in a bottle exactly like this, and ask me if I do not remember it; I do not recollect that particular bottle. I do not say that you did not,—there were quite a number of bottles shown me for identification. \* \* \* 'Grapine' is about the same shade of color as sarsaparilla and 'Coca-Cola' \* \* \* it has about the same general appearance and color. Anterior to this convention of bottlers that I speak of, the 'Coca-

Cola' bottle had the trade-mark blown in all over the bottle in various positions—that is, there was no particular place where they blew in the name 'Coca-Cola.' The trade-mark itself was uniform, but it was not uniformly blown in the same place on every bottle. (Rec., 644). \* \* \* Yes, sir, you exhibited a number of bottles to me and I recognized them as *various types of* 'Coca-Cola' bottles that were used prior to the adoption of the standard bottle." Rec., 645).

T. C. LUPTON, manager of the Coca-Cola Bottling Co., Dallas, Texas Rec., 786-7):

"You ask if the bottle which you hold in your hand, *plaintiff's exhibit* 154, is a 'Coca-Cola' bottle; no, sir, that is a soda water bottle.

"Q. Then, what you meant was—when you answered my previous question about 'Brew' being in 'Coca-Cola' bottles—you meant in a bottle which contained the trade-mark blown on the shoulder of the bottle? A. That is right, Judge.

"You say that nobody would mistake the bottle which you hold in your hand (*exhibit* 153) for a 'Coca-Cola' bottle; well, Judge, some people, you know, could be mistaken in it,—it is the *size* of the 'Coca-Cola' bottle, but it has not the *trade-mark*. No, sir, the bottle you hold in your hand is not like a 'Coca-Cola' bottle except for the fact that the word 'Coca-Cola' is not blown on the shoulder. No, sir, it is not like a 'Coca-Cola' bottle. You ask how it *differs* from a 'Coca-Cola' bottle—well, Judge, it is a little bit taller, it is built a little different from 'Coca-Cola' bottles. You ask me, then, how it is that I say people would *mistake* this *exhibit* No. 153

for a '*Coca-Cola*' bottle; well, they hold the same, Judge, they hold the same amount.

"Q. I asked you why you swore that that bottle, No. 153, not being a '*Coca-Cola*' bottle, could ever be *mistaken* for a '*Coca-Cola*' bottle; why did you swear that? A. Well, Judge, *they could be mistaken*, according to my judgement, because the '*C-C's*' on it, they would take that for a '*Coca-Cola*' bottle,—could do it, couldn't they?

"You ask who would; I say, anybody drinking it, it is about the *shape* of the '*Coca-Cola*' bottle. I believe, Judge, that *anybody* looking at that bottle, No. 153, *would be liable to take it for a 'Coca-Cola' bottle*.

"Q. In other words, *it would take an expert like you*—A. No.

"Q. *To pick out a 'Coca-Cola' bottle from one of the soda water bottles?* A. *Yes, it is hard, Judge, it is hard, no doubt about that.*

"Q. About as hard a task as sorting out black-eyed peas one from another? A. I did not say black-eyed peas, but *it is a hard job.*" (Rec., 786-787).

## SCHEDULE VIII.

### The Dispensing Bottle.

J. A. HODGE, manager of the Illinois Glass Co.,  
Dallas, Texas (Rec., 156-8):

*"Defendants' exhibit 223* is a stock bottle that we carry in stock. It is not a special design made for any particular concern; it is what we call a machine made dispensing bottle,—the only form of the kind we have. We had never sold that to the Coca-Cola Co. We sold the Jersey Creme Co., in Fort Worth, and Hughes Bros., in Dallas, A. M. Brown in Dallas, and sold to the various decorators for stock packages. Some of the decorations that have been on there were: 'True-Cola,' for Hughes Bros.; 'Koke,' for the Koke Co.; 'Howel's Orange Juice' and 'Grape Juice' for the Jersey Creme Co. That is the cheapest thing we have. I have sold some of these bottles to the Koke Co. of Texas. I have a copy here of our invoice—the only one we ever entered—one bill which went forward from the house on June 16, 1913. *Defendants' exhibit 224* is a carbon copy of the bill sent over at the time the shipment was made. \* \* \* *Defendants' exhibit 225* is the bottle we sold the Koke Company of Texas. There is a mark on the bottle showing it is an automatic machine made bottle,—the peculiar mark at the end of the glass where it is cut off. The automatic machine makes that mark on every bottle, and no other kind of bottle has that kind of a mark on it. \* \* \* He [the representative of the Koke Company of Texas] told me he was getting up this company and was going to use a bottle. \* \* \* He did not tell me anything about any particular design,—just the cheapest thing we had,



—and this, as a matter of fact, is the cheapest. We formerly made this bottle by hand, and it ran as high as \$18.00 a gross, and then, when we made it by machine—machine made bottle—it took off 33 1-3 per cent in price. \* \* \* 'The other styles are more expensive than this; they are made by hand.'

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1635):

"The dispensing bottle marked *defendant's exhibit* 173 is a sample of the dispensing bottle purchased by us and used by the Koke Companies,—that was furnished dealers. I did not pick out the design of dispensing bottle,—just sent them,—that is, the local representative of the Illinois Glass Works here,—gave him my label and told him I wanted a dispensing bottle, one of their stock dispensing bottles, and wanted my 'Koke' on there, and that is the bottle they shipped me. 'That is the cheapest bottle they had.'

C. H. JOUETT, associated with the Live & Let Live Drug Co., Chattanooga, but formerly drug clerk at the Miller Pharmacy, Chattanooga (Rec., 1052-3):

"At the Miller Pharmacy the syrups for the different drinks they had were kept in dispensing bottles, tanks and pump jars. \* \* \* 'They [the dispensing bottles] were of the *same shape*, and they were *labelled* so we would know them one from the other.'" (Rec., 1052-1053).

GEORGE H. WILKINS, the private detective from the office of Edward S. Rogers, Esq., in referring to one

of defendants' dispensing bottles which he saw in the office of J. H. Van Winkle, the manager of the Koke Company of Texas, said (Rec., 873):

"I saw a bottle standing on Mr. VanWinkle's desk which was *the ordinary type of dispensing bottle commonly used at soda fountains.* \* \* \* On the face of the bottle, blown in on the lable, was the word, 'KOKÉ,'—'K-O-K-E.' "

There is no evidence the other way.

The only testimony plaintiff has produced with respect to dispensing bottles at all, is as follows:

SAMUEL C. DOBBS (Rec., 319-20):

"The Coca-Cola Company furnishes dispensing bottles, a sample of one of which is shown by Exhibit 59."

## SCHEDULE IX.

### The Label.

"The only evidence plaintiff has offered to substantiate its oft repeated assertion that its bottle label is distinctive, is the testimony of Samuel C. Dobbs, its vice-president, as follows (Rec., 322):

"Exhibit 61 and 62 are labels used on 'Coca-Cola' bottles. This particular form has been in use since 1907. Previous to that time we used a label similar in shape, but read in color."

J. C. MAYFIELD, Sr., president of the Koke Company of America, says (Rec., 1628):

"We have had various sizes and kinds of labels, but have not adopted any particular size or shape."

Specimens of a few of the several different kinds of labels the defendants have used are shown by the following exhibits (The first column shows the number of the exhibit; the second, what the exhibit is, and the third the page of the record where it is identified):

1	2	3
Defts'. Ex. 79.....	Shipping tag .....	Rec., 1622
Defts'. Ex. 119.....	"Koke" Barrel Label .....	Rec., 1627
Defts'. Ex. 120.....	"Koke" Barrel Label .....	Rec., 1627
Defts'. Ex. 121.....	"Koke" Jug Label .....	Rec., 1627
Defts'. Ex. 122.....	"Koke" Bottle Label (Square).....	Rec., 1627
	"Koke" Bottle Label (Diamond shape, with "Koke" in red, on yellow back- ground) .....	Rec., 1627
Defts'. Ex. 123.....	"Koke" Shipping Tag for Barrels and kegs .....	Rec., 1627
Defts'. Ex. 124.....		Rec., 1627

	"Koke" Bottle Label (Diamond shape, with word "Koke" in blue, on light blue background)	Rec., 1628
Defts'. Ex. 125.....		
	"Koke" Bottle Label (Same as Defts'. Ex. 125)	Rec., 1571
Defts'. Ex. 59.....		
Defts'. Ex. 158.....	Sticker for attaching to invoices.....	Rec., 1632
Defts'. Ex. 165.....	"Dope" Bottle Label .....	Rec., 1633
	"Koke" Bottle Label (used in Shreve- port, La.) .....	Rec., 1700
Defts'. Ex. 181.....		

Defendants also stencil the word "Koke" and "Dope" on their barrels and kegs.

Of all these different kinds of labels, the only one that plaintiff has had the face to complain of as in any wise resembling any of its labels, is the blue bottle label marked *Defendants' Exhibit 125* (also shown as *Defendants' Exhibit 59*), which is said to resemble the label sometimes (but by no means generally) used on the bottles containing the aerated beverage made from plaintiff's syrup. If defendants had deliberately set out to fraudulently imitate plaintiff's labels so as to enable their goods to be passed off for plaintiff's goods, it is 'passing strange that they would have "fraudulently imitated" only the bottle labels and not any of the other labels on any of the other packages. The fact that all of defendants' other labels are strikingly different from the corresponding labels used by plaintiff is a strong circumstance tending to negative an intent to fraudulently imitate plaintiff's labels.

*Plaintiff's rebuttal exhibits 5, 6 and 9* to the testimony of W. F. Boylin (Rec., 144-5), are catalogs, and pages from catalogs, of the American Label Works, Nashville, Tenn., showing numerous specimens of bottle labels

used generally in the trade by all soft drink bottlers. It will be observed from the specimens of labels here shown that the size, shape, color, design and wording around the periphery of plaintiff's bottle label—namely, "*Bottled under authority of,*"—are all features which are old in the art and common to the trade, and afford no indication whatever as to maker. The trade name of the product shown conspicuously in the center of the label, together with the name of the concern under whose authority it is bottles, are the only indications of origin to which an intending purchaser, exercising ordinary care to ascertain what he was getting, would be justified in looking. (See also *defendants'* (?) *exhibit* 24, the Murfreesboro "Koke" label, Rec., pp. 2007-16-20-29-30; and *defendants'* *exhibit* 30, the Houppert & Smyly "Dope" label, Rec., 1394; and *defendants'* *exhibit* 5, the "Star-Cola" label).

The particular blue bottle label about which so much has been said, does resemble the corresponding bottle label used by plaintiff in certain respects. It is about the same size and shape, and the color scheme is substantially the same. It has the same wording around the border, namely, *Bottled under authority of the,*" and the signature of "*W. McCarty Moore, Pt.,*" is printed in the place where the signature of "Asa G. Candler," P. I., "is printed on plaintiff's label. But *defendants'* label plainly states that the article to which it is attached is "Bottled under the authority of the Koke Company of Texas, Dallas, Texas," in one instance, and, in the other, that it is "Bottled under au-

thority of the Southern Koke Company, Limited, New Orleans, La." It bears the signature of "W. McCarty Moore," and not that of "Asa G. Candler," and the two signatures have no resemblance. The most prominent feature of both labels is the name of the product boldly displayed in the center. Plaintiff's bear the words "Coca-Cola" in large type, while defendants' bears the word "Koke" in type equally large and conspicuous. No one in the exercise of the slightest care to ascertain what he was getting could possibly be misled as to the source of the goods to which defendants' label was attached. He would see at a glance that it was "*Koke*" and not "*Coca-Cola*," and that it was "bottled under authority of the *Koke Company of Texas, at Dallas, Texas*," or "*under the authority of the Southern Koke Company, Limited, at New Orleans.*," and not under the authority of the "*Coca-Cola Company, Atlanta, Ga.*" There is no evidence that this label has, in fact, ever deceived anybody, and as its use has been discarded, there is no probability that it ever will. It was used only by two bottlers,—one in New Orleans and the other in Dallas, Texas,—for a period of about five or six months in 1913. Its use was wholly discontinued upon instructions from J. C. Mayfield, Sr., many months before this suit was brought, and a yellow and red label, having no similarity to plaintiff's label, was thereupon adopted and has since been used in its stead. No sort of complaint is made as to the new label.

See the testimony of J. C. Mayfield, Sr., (Rec., 1634-



4); J. A. Bermudez, (Rec., 1499); John F. Williams, (Rec., 1549); W. McCarty Moore, (Rec., 1743-8).

Plaintiff has introduced five bottles (*Plaintiff's Exhibits* 157 to 160, inclusive), having attached to them a blue "Koke" bottle label, (*Defendants' Exhibit* 125), which plaintiff's detective, Sam Friend, says he purchased at Payne's Soft Drink Stand in Dallas, Texas at 8:30 a. m., September 10th, 1914 (Rec., 849), the day before he gave his testimony in this case (Rec., 682). If these bottles were *bona fide* purchases, actually made at the time Friend says he bought them, that would not disprove the fact that the use of this label was discontinued generally pursuant to defendants' instructions. All it would prove would be that in the isolated instances thus shown, a few of them were used by defendants' bottler in Dallas, Texas, on or about September 10th, 1914, without the knowledge or consent of the defendants, and against their instructions.

It will be observed that all five of the bottles which Friend has produced have *plain* tin crowns, *without any name or decoration of any kind whatever*. The *paper labels* are the *only* things on the bottles *to indicate what they contain*. Friend also produced two other bottles (*Plaintiff's Exhibit* 154 and 155, which he says he purchased at the store of A. Conti, 2510 Elm Street, Dallas, Texas, fifteen minutes before he bought the five other bottles above referred to. These two bottles have the regular *decorated "Koke" crown*, and *no paper labels* at all. (See Exhibits referred to). This makes it plain that the Dallas bottler probably had run short of the

regular *decorated "Koke" crowns*, and that, in the emergency, as a temporary expedient, he had affixed the *paper labels* to the *bottles for which he had no decorated crowns*, in order to have *something* on them to indicate what they contained.

But, as a matter of fact, it is exceedingly doubtful whether the five bottles mentioned really represent bona fide purchases. Friend says they were purchased by him at 8:30 a. m., September 10th, 1914, (Rec., 849), the day before he gave his testimony (Rec., 682), and yet when they were unwrapped in the presence of the commissioner on September 11th, 1914, it was discovered that they were wrapped in a newspaper bearing date of May 10th, 1914. (Rec., 853). Friend says he was stopping at the Adolphus Hotel in Dallas at the time, and admits that the Adolphus does not leave old newspapers lying around in the rooms of its guests; that he did not send for any paper with which to wrap up these bottles; and that if this newspaper was in the Adolphus Hotel, it was not in his room. (Rec., 853). He finally said that H. B. Pierce, plaintiff's chief detective, furnished the paper. Pierce was also stopping at the Adolphus at the time. (Rec., 853). When Pierce later took the stand (Rec., 2074), he offered no explanation whatever as to how these bottles, alleged to have been purchased the day before, came to be wrapped in an Atlanta newspaper bearing a date four months previous. Friend admitted that "it was rather a clumsy hand" that put these labels on, and that "it looks like a botchy piece of work." (Rec., 852). He says that the labels "appear to have been put on clumsily, and the glue projects on the bottles outside

of the labels." (Rec., 852). He admits that the labels "are smeared and rumpled." (Rec., 852), and then volunteers the information "that" I could not tell who put that label on, because I didn't." (Rec., 852).

These five bottles are the only ones plaintiff has produced as evidence that any of defendants' bottlers ever used the blue labels after defendants had ordered its use discontinued, although plaintiff's hordes of detectives have been for two years or more raking the country with a fine tooth comb in search of evidence that would be damaging to defendants. (Rec., 2101).

The circumstances showing how W. McCarty Moore happened to get up the blue label are fully explained by Mr. Moore, (Rec., 1743, et seq.), and entirely exonerate the defendants from any charge of fraud.

## SCREDULE X.

### The Crown.

#### 1

### Physical Exhibits.

*Defendants' Exhibit 179* (Rec., 1642) is an envelope containing a large number of crowns that are in general use on the bottles, not only of the various brands of cola drinks, but of other kinds of soft drinks as well, such as sarsaparilla, root beer &c. Among the brands shown are, "Cola-Queen," "Arrow-Cola," "Coca-Cola," "Koke," "Celery-Cola," "Candy-Cola," "Cola," "Cola-Nip," "Rye-Ola," "Gay-Ola," "Mint-Cola," "Luck-Ola," "Peach-A-Ola," "Pure-Cola," "Sarsaparilla." These crowns are all of the same color and design as plaintiff's crown,—that is, they have the name of the product printed in red, on a silver background, with a red ring around the circumference of the crown. This is perhaps the most generally used design of crown on the market. The crown manufacturers turn out these crowns by the millions, and sell them to every one who does not specify any particular design. Crowns of this same design, used on other cola products, will be found on the bottles filed as *Defendants' Exhibit 1, 2, 3, 4, 6, 43 to 54, inclusive, 189 to 213, inclusive, and 215 to 223, inclusive,* and on Plaintiff's Rebuttal Exhibits 68 to 77, inclusive.

There is not a word of testimony in the record to the effect that the color and design of plaintiff's crown is,

to any extent whatever, different from the color and design of crowns used generally in the trade, or that it affords the slightest indication, either to the general public or to any one else, as to the origin or manufacture of the goods.

## 2

### Admissions of Plaintiff's Witnesses.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., who formerly bottled a drink similar to "Coca-Cola" in bottles having thereon crowns (For specimen, see Plaintiff's Rebuttal Exhibit 101-2) exactly like the "Koke" crowns used on defendants' bottles. (Rec., 20-26-7):

"You asked why we had our 'Koke' crowns—those marked *Plaintiff's Rebuttal exhibits 101 and 102*,—printed in that color, and on that silver background; why, just showy, I suppose, is why. We had *other crowns like that*, red, on a silver background, with a red circle around them. \* \* \*

"Q. Did you think anybody would mistake that crown for a 'Coca-Cola' crown? A. Not the *reading* of the crown.

"Q. Well, do you think the *general appearance* of the crown—anybody would mistake it? A. The only resemblance between that and the 'Coca-Cola' crown is a little flourish on the lettering.

"Q. And you think anybody could tell that right off? A. I think they could."

S. B. CHRISTY, the partner of J. W. Huggins (Rec., 20-29-30):

"I would not be able to tell you when we began to use the crown marked *Plaintiff's Rebuttal Exhibit No. 101*,—probably 1905. \* \* \* At that time \* \* \* *a good many of them had crowns like those*—I mean red, on a silver back ground. I suppose crowns like that, the red letters on a silver back ground, with a red ring around them, were *in general use* at that time [in 1905]. There was no objection to our using them at that time."

H. B. PIERCE, plaintiff's chief detective (Rec., 2137):

"Q. Does the name 'Dope,' as it appears on the caps of defendants' bottles, look like the name 'Coca-Cola'!? A. Only the script or style of letters used. \* \* \*

"Q. Do you think you would mistake that name for the name 'Coca-Cola' on the crown of the bottle? A. Not I, I would not.

"Q. Do you think anybody would? A. They may, I do not know.

"Q. Do you think any rational being, anybody with common sense would? A. I do not know.

"(Mr. Hirsch: I object to that. He don't know what a rational being with common sense would do).

"Q. Would you mistake the [word] 'Koke' written in [script on the] caps *on* [of] defendants' bottles, for the name 'Coca-Cola'? A. No."

G. H. WILKINS, the detective in the employ of Edward S. Rogers, Esq., Chicago (Rec., 883-7):

"When I bought these bottles I knew all the time by looking at the bottles that they were not 'Coca-Cola,'—yes, sir, when I saw the bottle I did. Rec.,



883). \* \* \* When I saw the bottle I knew it was not 'Coca-Cola.' (Rec., 884). \* \* \* You ask if I did not know that these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case were wrapped up. Of course, I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew they were not 'Coca-Cola.' (Rec., 886). \* \* \* If he hands it across, I would know that it was not Coca-Cola.' You ask if I would know that *as soon as I saw the crown*; to the best of my knowledge it would *not* be 'Coca-Cola' with a 'Koke' crown. \* \* \* No, I did not mean to tell you that that looks anything like 'Coca-Cola' to me, now, because I have handled too many of them. I do not believe it did look to me like 'Coca-Cola' the first time I saw it." (Rec., 886-887).

## SCHEDULE XI.

THE MARKS "DOPE" AND "KOKE" DO NOT DECEPTIVELY RESEMBLE THE MARK "COCA-COLA."

*Coca-Cola Co. vs. Branham*, 216 Fed. 264;  
*Coca-Cola Co. vs. Koke Co. of America*, *Certified Copies of Certain Opinions and Decrees*, page 14; *Appelle's Brief*, Appendix 4, page 164). .....

### Admissions of Plaintiff's Witnesses.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., who formerly bottled a product which he labeled "Koke" in the identical style of type as that used by defendants:

"Q. Mr. Huggins, did you consider that your trade-mark 'Koke' so nearly resembled the trade-mark 'Coca-Cola' as to be likely to cause confusion in trade, or to deceive purchasers? A. I do not think that there was but very little resemblance in the forming of the two words,—in the formation of the two names.

"Q. Well, did you think there was *any* resemblance between them, in *sound*, *appearance* or *suggestion*? A. No, sir; not between 'Coca-Cola and 'Koke.'

"Q. You consider them *entirely different words*? A. *I consider them entirely different words.*

"Q. Not only in the *appearance*, but in the *sound* of them? A. Yes, sir.

"Q. And in their *significance*? A. *Yes, sir.*"  
(Rec., 2019-2020).

S. B. CHRISTY, the partner of J. W. Huggins in the "Coca-Cola" bottling business at Murfreesboro, Tenn., and who was formerly the partner of Huggins when he bottled the product "Koke":

"Q. Did you think you had a right to put this name 'Koke' on there? A. The Government thought so.

"Q. Didn't you know this name 'Koke,'—anybody looking at it would right off think it was 'Coca-Cola'? A. *No, sir.*" \* \* \*

"Q. Didn't you know that the appearance of that word, 'Koke,' as it is written on that label marked *Defendants' Exhibit No. 24*, looks so much like 'Coca-Cola' that you cannot tell the difference? A. *No.*

"Q. You mean to say it looks *different* from 'Coca-Cola'? A. *Yes.*

"Q. You mean to say that *any body can tell the difference right off*? A. *Anybody that cold read, they could.*

"Q. But, as a matter of fact, however, it *sounds* just like the four syllable name 'Coca-Cola, don't it? A. *No.*

"Q. Do you think *anybody could tell the difference in sound* between the word 'Koke' and the word 'Coca-Cola'? A. *Yes.* Rec., 2030-2031) \* \* \* Q. Don't you know, Mr. Christy, that you adopted that name 'Koke' for the sole and only purpose of enabling you to substitute your beverage for 'Coca-

Cola,' and pass it off to the public and fool them and make them think it was 'Coca-Cola'? A. No, we did not try to fool them that it was 'Coca-Cola,' because *they knew it was not 'Coca-Cola.'* Q. *How did they know that it was not 'Coca-Cola'?* A. We advertised it as 'Koke.' (Rec., 2032-2033).

H. B. PIERCE, the chief detective for the Coca-Cola Co. in charge of working up the facts in this case:

"Q. Does the name 'Dope,' as it appears on the caps of the defendants' bottles, look like the name 'Coca-Cola'? A. *Only the script or style of letter used.* \* \* \* Q. Do you think you would mistake *that* for the name 'Coca-Cola' on the crown of the bottle? A. Not I, *I would not.* Q. Do you think *anybody would?* A. They may; I do not know. Q. Do you think *any rational being, anybody with common sense* would? A. I do not know. (Mr. Hirsch: I object to that. *He don't know what a rational being with common sense would do.*) Q. Would you mistake the [word] 'Koke' written in [script on the] caps on defendants' bottles for the name 'Coca-Cola'? A. No." (Rec., 2137).

GEORGE H. WILKINS, the private detective in the employ of Messrs Read & Rodgers, attorneys for the Coca-Cola Company, Chicago:

"I purchased these green flint bottles, Exhibits Nos. 180, 181 and 182, in New Orleans. I took these bottles out with me after buying them because I wanted evidence that they were substituting and selling 'Koke.' When I bought these bottles I knew all the time by looking at the bottles, that they were

not 'Coca-Cola.' Yes, sir, when I saw the bottle I did. And in the case of the Comus, I did not see the bottle. The man wrapped it in a newspaper and handed it to me. No, I would not know whether it was a bottle of 'Koke' or Ginger-Beer if it was wrapped in a newspaper. When I saw the bottle I knew that it was not 'Coca-Cola.' In the places where I did see the bottle before purchasing same, or at the time of my purchase, I knew that it was not 'Coca-Cola' I was purchasing, that was why I wanted the bottle. (Rec., 883-884) \* \* \* You ask if I did not know that these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew they were not 'Coca-Cola.' \* \* \* You say that of course if he covers it one could not tell if it was a bottle or not; you mean if I looked at it; if he handed it across I would know that it was not 'Coca-Cola.' You ask if I know that as soon as I saw the crown; to the best of my knowledge it would not be 'Coca-Cola' with a 'Koke' crown. \* \* \* No, I do not mean to tell you that that looks anything like 'Coca-Cola' now, because I have handled too many of them. I do not believe it did look like 'Coca-Cola' to me the first time I saw it. (Rec., 886-887).

FREDERICK CONWAY PEACE, an ex-Pinkerton detective in the employ of the Coca-Cola Company to work up the facts in this case:

"You ask if I have seen the bottled 'Koke' or 'Dope' put out by bottlers; yes, sir, but not in Dallas, I saw them down in Mississippi. Yes, sir; the crown was on them. Yes, sir; I have also seen the bottled

goods sold at various places with the name 'Dope' on the crown—it would not be anywhere else on the bottle. It was not blown in the glass, and *when the crown was pulled off* and the consumer had got the bottle, *he could not tell what was in the bottle; it would not be labeled then.* (Rec., 2216).

GEORGE J. MARTIN, a traveling salesman for the Coca-Cola Company:

"Yes, I have drank 'Koke.' Q. You could tell right off it was not 'Coca-Cola,' couldn't you? A. Well, of course, I got it out of a 'Koke' bottle \* \* \* If he had given it to me *and I had not seen the label on it*, I don't know what I would have thought." (Rec. 345).

E. R. ALBRIGHT, a member of the firm of Albright & Wood, which operates two drug stores in Mobile, Alabama:

"I wanted the stuff ['Koke'] shipped *without the labels*, because I did not care for my customers to know that I was using the stuff at all; if they knew it, they might use it in an unfair way and say I was using it instead of 'Coca-Cola.' (Rec., 548).

DAVE S. BAUER, a retail druggist, Mobile Ala.:

"I had given instructions to my soda dispensers to make inquiry of purchasers who asked for 'dope' and 'coke' if they wanted 'Coca-Cola.' When they say 'Give me just what we ask for,' we say, 'Well, we do not carry anything but Coca-Cola.' In a good many instances they said 'Look here, I did not



come in here to be jollied. I came in here to get what I want.' The dispensers would then say, 'We just don't serve anything else but 'Coca-Cola,' and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted. The card referred to is the one marked *plaintiff's exhibit* 100. Of course I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want Coca-Cola.' I did not know there was *two* drinks. I did not know there was *another one like that*.'" (Rec., 537).

JOHN CAIN, a hired spotter for the Coca-Cola Company:

"The way I know they handled it ['Koke'] is because Mr. Rausch told me that he handled it. He told me that that day I went down there. He has got a bottle down there that you can see it—it is a syrup bottle, a bottle of syrup. It is syrup down there—'K-O-K-E'—*as big as life*.".....(Rec., 626).

D. P. ENGLISH, a retail druggist, Dallas, Texas:

"They got this product 'Koke' to which I refer from the Koke Company in Dallas, Texas, in barrels colored red. There was very little difference between their barrels and the Coca-Cola barrels—you know not notice it without examining the 'Koke' and *saw* [seeing] *if the 'Koke' label was on the end*." (Rec., 802).

CLARENCE J. HOGAN, a Pinkerton detective employed by the Coca-Cola Company as a spotter :

"We have produced all the 'Koke' that was offered us for 'Coca-Cola.' You say you take it for granted that we were not deceived when we got it; why, sure not. WE were out hunting for it and when we got it we simply picked it up and took it out. Sure we knew what it was when we got it." (Rec., 649-650).

FRANK J. BOGNER, another Pinkerton detective employed by the Coca-Cola Company as a spotter :

"Yes, sir, we produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola,' and when we got it we wrapped it up and put the name of the party we got it from on it. We went to see if we would get a substitute for 'Coca-Cola' or not, and when we got it we got what we were searching for, got the evidence against him. Of course, when those fellows gave us a bottle wrapped up we knew we had them." (Rec., 653).

B. J. GILLION, still another Pinkerton detective employed by the Coca-Cola Co. as a spotter :

"In each place we went to we called first for a glass of 'Coca-Cola,' and they served us out of the bottle—they poured it out of the bottle into a glass, we drank from the glass \* \* \* When we drank the drink we asked for a bottle of that drink under some circumstances and under other circumstances we did not ask for it. In each instance I saw the drink

which was served us in the bottle in which it was served, and in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so I was not deceived at any time by what I drank. In each instance where I ordered the drink and got it in a glass and followed it up by an order of a bottle, in each such instance I saw that it was a bottle of 'Koke' that had been served me in a glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca-Cola'. (Rec., 661).

In *Coca-Cola Company v's. Branham, et al*, the record in which case was filed without objection as Defendants' Exhibit 272 in this case, Walter Duckett, a witness for the Coca-Cola Company, in relating the circumstance that a bottle of 'Koke' was handed to him by a certain retail dealer in soft drinks in response to his request for 'Coca-Cola,' said: "I went into Mr. Sexton's store and asked for a bottle of 'Coca-Cola,' and they gave me a bottle of what looked to be 'Coca-Cola,' but I noticed on the label it was labeled 'Koke.'" (*Branham Rec.*, 46).

And again, in explaining how he discovered it was "Koke" and not "Coca-Cola," he said:

"I saw the 'Koke' label on the bottle, that is the way I noticed it." (*Branham Rec.*, 47).

E. D. SEXTON, a witness for the Coca-Cola Company, said:

"The 'Koke' that I speak of \* \* \* was labeled on top something similar to the 'Coca-Cola,—the same kind of surroundings on it, but of course, it did not have the same printing on it." (*Branham Rec.*, 47).

F. S. WOODRUFF, a witness for the Coca-Cola Company explains that he rescued the cap of a 'Koke' bottle that had been served to him in response to his request for 'Coca-Cola,' and thereby discovered that it was 'Koke' and not 'Coca-Cola' that had been handed to him. He said:

"We broke the balls and commenced to play, and he came back with two bottles like that (indicating) and started the cap of one bottle for Mr. Duckett, and I walked over and took a key from my pocket and uncapped mine and put the cap in my pocket. The cap was printed 'Koke.' " (Branham Rec., 50).

GEORGE VANCE, a witness for the Coca-Cola Company was asked if he believed that the bottled beverage offered to him at the fair grounds in response to his request for "Coca-Cola" was "Coca-Cola," and he said:

"No, sir, I would not testify to believing that I bought a Coca-Cola bottle by the bottle, or by the label, or by the general appearance of the bottle and the label." (Branham Rec., 52).

T. A. PENNY, a witness for the Coca-Cola Company swore:

"I examined the stopper of the bottle marked Exhibit "A," and state that *the characters used in the word 'Koke' are not the same that are used in Coca-Cola.*" (Branham Rec., p. 38).

## SCHEDULE XII.

### The Slang Expressions, "Coke," "Dope," Etc.

The slang expressions "coke," "dope," "shot in the arm," &c., as used by the public in asking for soft drinks, have not and could not have acquired a secondary meaning, indicating origin and distinguishing the character of drink which the words appropriately describe, when made by plaintiff, from the same kind of drink when made by others, because the words have no reference whatever to maker, but refer solely to the ingredients and characteristics of the article itself.

#### 1

### Testimony of Defendants' Witnesses.

MAX BLOOMSTEIN, a retail druggist for 30 years, Nashville, Tenn. (Rec., 1145-7).

"We handle 'Coca-Cola,' and Diehl & Lord's 'Star-Cola,' and 'Koke' and 'Dope.' I am about the fountain frequently, and can hear the words our customers use in asking for the different drinks they want. \* \* \* The words 'coke' and 'dope' are used very largely, generally signifying that they want any stimulating drink that has caffeine in it. \* \* \* Generally it means just any of them. Any drink with caffeine,—any stimulating drink—is called for by the name of 'coke' or 'dope.' When a customer comes in to our soda fountain and asks for a 'coke' or a 'dope,' right now he is served with

the 'Koke' or 'Dope' preparation made in Chattanooga. Before that was put on the market he was usually served with 'Star-Cola,' made by Diehl & Lord. When a customer comes in and asks for a 'coke' or a 'dope' and is served with Diehl & Lord's 'Star-Cola,' I surely consider that I am giving him what he asked for. I have heard these words 'coke' and 'dope' from five to ten years. I cannot state exactly. The words 'coke' and 'dope' mean to me any drink having caffeine or stimulant in them. I regard these names 'coke' and 'dope' as nicknames designating a class of drinks, rather than a specific drink. I cannot say just exactly where that slang 'coke' and 'dope' originated. I presume it originated because it just had the same effect. I have heard the word 'dope,' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to the drink, quite a number of years ago. I have no way exactly of knowing how long. I have heard it applied to the drinks, but 'dope' seems to me to be something that stimulates, or makes you feel a little better, or a little different, from what you ordinarily did. It was originally applied to morphine and cocaine, because it temporarily rejuvenated a man, and I think it was applied to 'Coca-Cola' just after having been applied to the cocaine and morphine drugs, that is my idea. I have known, ever since I have known drinks, just what was in them. I do not know whether the ordinary layman who drinks them knows what is in them, but I have always known why they stimulate, and why they have that effect. There is caffeine in them. Caffeine is referred to by the public frequently as a 'dope.' "

JOHN R. PARDUE, soda dispenser, Nashville, Tenn. :



"Some of the cola drinks we have are 'Koke,' 'Dope,' and 'Coca-Cola.' Others I have dispensed since I have been dispensing soda water are 'Star-Cola,' 'Fletcher's Cola,'—I believe those are about the only ones. I have been dispensing soda water about ten years, I think. \* \* \* Some customers called for 'Coca-Cola,' some for 'dope' and some for 'coke.' We have had a few calls for 'shot-in-the-arm.' \* \* \* When they ask for 'coke' or 'dope' they want something of that class,—a cola drink. When a customer comes in and asks for a 'coke' or a 'dope,' I do not understand that he is making a specific or definite request on me for 'Coca-Cola' exclusively. I frequently go into soda fountains myself and ask for cola drinks. I ask for them as 'coke' or 'dope'; it makes no difference to me as I get a cola drink. (Rec., 1133-4) \* \* \* 'Coke' and 'dope' is just a nickname applied to cola drinks. I suppose it arose something on the cocaine idea,—about cocaine being in the drinks,—in 'Fletcher's Cola,' 'Coca-Cola,' and several other drinks. \* \* \* I have heard that it was in all cola drinks; customers have said so at the fountain,—that there was cocaine in cola drinks, 'Koke,' and 'Dope,' or 'Coca-Cola.' I first heard the expressions 'coke' and 'dope' some ten or twelve years ago, I think. \* \* \* The reason the nicknames arose was on account of the discussion as to the cocaine, that is my idea. \* \* \* I have heard of cocaine in regard to 'Coca-Cola' and 'Fletcher's Cola' and all of them. (Rec., 1138-9). \* \* \* They just said all Coca-Cola and dopes all had dope in it, and I heard that about ten years ago, and we have discussed that ever since. (Rec., 1140). \* \* \* I do not know how these names 'coke' and 'dope' originated, except the discussions about cocaine.

\* \* \* We have more calls for just 'root beer' than for 'Hires root beer.' Like you go up to a bar and call for a beer, there don't every one go up to a bar and say give me a certain kind of beer, they just say they want a glass of beer. When people ask for 'coke' and 'dope,' they want a cola drink,—a stimulating drink. \* \* \* Customers tell me it is all dope, is all I know about it,—and a dope will make you feel good, it will liven you up, it comes from stimulation. A 'dope-fiend' is a fellow that takes 'dope,'—it is something that livens you up, makes you feel good,—it is a drug." (Rec. 1143-4).

A. S. JOSEPH, proprietor Woodward Bar, Birmingham, Ala.:

"During the time I have been at that bar I have dispensed all the different colas,—too numerous for me to remember the different names. Some of them are 'Chero-Cola,' 'Coca-Cola,' 'Nifti-Cola,' 'Gay-Ola,' and others. I do not know how many of these cola drinks are on the market here in Birmingham,—possibly 8 or 10. (Rec., 1331). \* \* \* In asking for these different cola drinks some customers specify what they want, and others do not. I hear the word 'dope' used very frequently. When they ask for a 'dope' I get them the first thing I put my hands on in the soft drink line. I am about the bar myself six to eight hours a day. \* \* \* I hear the customers ask for drinks they want. When a customer comes in and asks for a 'dope,' I do not consider that he has made a specific and definite request on me for 'Coca-Cola.' The general impression is that all these soft drinks *along that line*, whether designated by one name or the other, is all

on the 'dope' order,—'coke' order; some call it 'dope' and some call it 'coke.' 'Dope' means to me ordinarily a narcotic. I have an idea why they call these drinks 'dope.' I think that the advertising that the public has got out of the newspapers at various times when these suits were brought kind of educated them along the lines of what they contain, or at least gave the impression that all these 'dope' drinks contained some kind of 'dope' or 'coke' on the order of a narcotic, and they would come in and say, 'give me a "dope,"' or 'a "coke,"' under the impression that they are going to get some percentage of narcotic. \* \* \* The general discussion among the consumers of these colas is that all cola drinks contain some percentage of narcotic. \* \* \* It has been created in the mind of these people that it is the game to play, that there is a slight percentage of narcotic in these drinks, and they cannot go up against morphine or cocaine, so they play the other. \* \* \* The impression has been created, and still exists, that all cola beverages contain a percentage of narcotic. \* \* \* (Rec., 1332-3). \* \* \* When a man comes into my place of business and asks for a 'dope' or a 'coke' I give any soft drink; it does not make any difference, just the one I put my hand on. I do not consider 'dope' and 'coke' names for lemon soda, strawberry soda, or anything; that is *soda water*, and they have an entirely different purpose. That [the cola drink] comes under a head of entirely different beverage from sarsaparilla and lemon soda. What we give them when they ask for 'coke' or 'dope' depends upon what brand of goods we handle; we might have three or four different brands, such as 'Chero-Cola,' 'Coca-

Cola,' 'Nifty-Cola.' \* \* \* 'That impression arose with regard to the impression about 'Koke,'—'K-o-k-e'—that it had this narcotic in it, because, when they speak of morphine or cocaine, they designate it as 'coke.' 'Coke' would designate cocaine or morphine, and the impression is that 'Koke' has cocaine or morphine in it." (Rec., 1334).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville, Tenn. (Rec., 1091):

"Customers ask for my product at the soda fountain as 'cola,' 'coke' and 'dope.' I have heard these words 'coke' and 'dope,'—I do not know that I could say that I have paid any very great attention to it, only in the past few years, probably. I do not know that I have paid particular attention to it,—since the last four or five or six or seven years, probably. It may have been longer than that, but I do not know. The word 'dope' means to me that they want a caffeine drink. \* \* \* The word 'coke' means the same thing. If a man asked me to take a 'dope' with him, I would naturally think it was a caffeine drink, whether it was 'Coca-Cola,' 'Gay-Ola,' 'Rye-Ola,' my own drink, or some one else's. I do not think the public would care what it was, whether one or the other, so they got a drink that satisfied their palate, and was strong enough in caffeine to feel it, you might say."

F. C. DORIDER, for 27 years in the confectionery and soda business, Nashville, Tenn. (Rec., 1195-7):

"I have heard customers come in and ask for 'coke,' or 'dope.' Well, if we had a customer that was drinking 'Coca-Cola,' we naturally gave him

'Coca-Cola' when he called for 'dope.' We had 'Celery-Cola,'—and when they called for 'dope' and we knew they had been in the habit of drinking that, we gave them 'Celery-Cola.' We gave them 'Celery-Cola' or 'Cola-Ade,' as a great many of them were in the habit of calling for 'dope' like they do right now. \* \* \* My impression is I first began to buy that 'Celery-Cola' from him [J. C. Mayfield] 12 or 15 years ago, I cannot recall exactly. We handled different kinds of cola,—'Cola-Ade,' 'Celery-Cola,' 'Coca-Cola,' and a good many of those colas, I cannot recall them. \* \* \* I was about the soda fountain frequently myself so I would hear the names people used in asking for the drinks. \* \* \* I never heard of any kicks. Of course, the boy at the fountain is supposed to know what he is giving out to them; if they called for a 'dope' and he did not know what they wanted, he would ask. If any one came in and asked for 'dope,' I would ask him what he wanted. Some of the names they called for were 'Cola-Ade,'—we sold a great deal of 'Cola-Ade,'—we sold a great deal of Cola-Ade' for a while,—'Celery-Cola,' 'Coca-Cola,' whatever cola we had. We had customers come in and ask for a 'dope,' and when I asked him what he wanted, he would reply that he wanted a 'Cola-Ade,'—every day they done that. 'Celery-Cola' is what the most of them said they wanted. (Rec., 1195-6). \* \* \* When a customer would come in and ask for a 'dope' or a 'coke,' I do not consider that he had made a definite and specific request on me for 'Coca-Cola' alone,—not unless we knew he was drinking it; I mean a regular 'Coca-Cola' drinker that I knew wanted 'Coca-Cola.' The word 'dope' means,—well, I suppose the cola people are suppose to give people the impression that they put cocaine in it, and I think the word

'dope' came from that; I don't know whether the rest of them did or not, but I always thought they did. The word 'dope,' as applied to soda fountain drinks means no particular drink. We consider it applies to these different drinks, like 'Cola-Ade,'—anything with the name cola to it. I think they have been serving 'Star-Cola' the last year or two at the ball park. Most everybody calls it 'dope,'—'Give me a "dope," boy,'—I suppose they know what they are getting; I think there is something on the bottle to indicate what it is,—I never noticed the bottle carefully. I hear lots of the boys dispensing 'Star-Cola,' calling 'dope,'—some say 'Star-Cola' and some say 'dope,' and different kinds of things. 'These words 'dope' and 'coke' are used in the trade to designate cola drinks as a class. I heard these words 'coke' and 'dope' fifteen or eighteen years ago, I reckon. I think during that time they have had the same meaning that they have now. If a customer fifteen or eighteen years ago would come into our soda fountain and ask for a 'dope,' if we did not know what he wanted, we would ask him what he wanted; we consider to or three of them 'dopes.''' (Rec., 1196-97).

C. P. EMBREY, a retail druggist, Chattanooga, Tenn. (Rec., 1019-21):

"I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola,' and one named 'Ko-Nut.' \* \* \* There are so many, nearly everybody who opens his grip when he comes in has a cola syrup to sell, and, naturally, you would not remember all that comes around; there is a great many cola drinks on the market. (Rec., 1019).



\* \* \* When customers call for 'dope' we give them the one we make the most money on. I do not regard the word 'dope' as a specific and definite request for 'Coca-Cola,' exclusively; I regard it as a nickname for that class of drink. I have heard the word 'dope,' I will say, ten years, but during all that time it had the same meaning to me that I have just stated. 'Dope' at a soda fountain means a drink that exhilarates, like [a] caffeine drink, and 'dope' at a prescription counter means some narcotic used in an abnormal way, or used in excess,—that is the way I look at it. The way I look at it, it has been in litigation that 'Coca-Cola,' or any of those dope products, are injurious to you, you see, and then people just got the idea that the drinking in excess would injure,—that is the way the public would think, whether it was true or not. \* \* \* We do not handle 'Hires root beer'; we have not for years. \* \* \* I have had calls for 'Hires root beer," and told them that we did not handle that, but handled Smith's root beer. The customers would be satisfied. They wanted a drink of that main general description. The same situation applies to the cola drinks." (Rec., 1020-1021).

F. M. BOGART, prescription clerk and soda dispenser, Chattanooga, Tenn.: (Rec., 1070-1):

"I am about the fountain frequently and can hear calls people make for the different drinks they want. We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' \* \* \* In making known to me the different cola drinks they want, some say, 'Give me a dope,' 'a shot-in-the-arm,' 'shoot me.' I understand when they ask for those names they want some stimulating drink. I do not understand that

they have made a definite and specific request for 'Coca-Cola' exclusively. I do not think these nick-names specify any certain brand of drink. We give them, when they call for these different names, just what we happen to have, 'My-Ola,' 'Mays-Ola.' \* \* \* I have never had any of these cola drinks, other than 'Coca-Cola,' rejected by a customer on the ground that it was not what he asked for, when served in response to a request for 'a dope,' or 'a shot,' or 'shoot me,' or any thing of that kind. \* \* \* When people call for 'dope,' 'shoot me,' or 'shot-in-the-arm,' I just imagine they want something to stimulate them,—dope."

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250-5):

"We dispense ice-cream sodas, root beer, 'Coca-Cola,' 'Dope,' 'Brain-Oil,' 'Gay-Ola,'—you know about the line of stuff. We handled all those. We do not dispense 'Gay-Ola' right at the present time. \* \* \* When a customer comes into our soda fountain and asks for a 'dope' or a 'coke,' I do not consider that he had made a definite and specific request on me to serve him 'Coca-Cola' only. (Rec., 1250). 'Dope' and 'Koke' are similar to 'Coca-Cola,' because both contain about the same constituents,—caffeine. That is the reason people call it 'dope,'—because it is a cola drink with caffeine. Before we handled 'Koke' and 'Dope' we used to handle a cola, and perhaps when a man wanted a 'dope' or a 'coke,' we gave him 'Brain-Oil,' or 'Coca-Cola,'—anything we wanted. \* \* \* If a man asks for 'Coca-Cola' he wants 'Coca-Cola,' and if he asks for a 'dope' he means most anything *in that line*. (Rec., 1253 \* \* \* When a man came in and asked

for a 'dope' or a 'coke,' we took it for granted he meant a cola drink; that that was a dope. (Rec., 1254). \* \* \* I never thought 'coke' and 'dope' were nicknames for 'Coca-Cola,'—not necessarily. My estimation of the term is that it is a cola drink." (Rec., 1255).

R. K. SMITH, head dispenser of the United Cigar Stores, Nashville, Tenn. (Rec., 1187-1191):

"We handle 'Coca-Cola,' that is the only one. We have people come into our fountain and ask for 'coke and 'dope.' If it should be a regular customer that I have been in the habit of serving at all times and know what he drinks, I give him 'Coca-Cola,' if that is what he drinks; otherwise, if he asks for 'coke' or 'dope,' I ask if he wants 'Coca-Cola.' \* \* \* I think that 'dope' would mean any kind of stimulating drink, or caffeine, or such as that,—headache medicine,—or 'Coca-Cola,' as a lot of people call that meaning 'Coca-Cola' when they say 'dope.' I have known of 'Fletcher's Cola' and 'Dope'; they are about the only two colas that I have seen. I have heard of more than that, I suppose, but not very much. If a customer came in and ask for a 'coke' or a 'dope,'—I do not know anything he likes, and he has not been a regular customer,—why, I would give him the one I made the most on. If I had a 'dope,' and he asked for 'dope,' I would be giving him what he is asking for. 'Dope,' in my opinion, does not exactly specify 'Coca-Cola.' I have people come in and ask for 'dope' when they want 'Capudine,' or any headache medicine,—for instance, 'Bromo-Seltzer. (Rec., 1187). \* \* \* I do not know whether or not among our trade the fact that there are other cola syrups on the market

and dispensed at the soda fountains in Nashville, is well known. 'There is no doubt but that it is known among some people. We have regular trade and transient trade, also; more of a regular trade than what you would call transient. When they call there, as a rule, we know what they want. \* \* \* I have not sold anything except the straight 'Coca-Cola.' I have no other drinks similar to that one, and, as I said a while ago, people come in and ask for a 'dope' and a great many times they mean a headache beverage, something like that,—a caffeine drink, or something stimulating. \* \* \* I have gone into a near beer stand or saloon and got a glass of beer; I have asked for it as 'a glass of foam,' a 'scuttle of suds,' or something of that sort. I expected to get whatever they were serving when I asked for the glass." (Rec., 1191).

T. H. LEVER, manager K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228-31):

"I dispense at my soda fountain a general line of drinks. I handle the 'Dope' and 'Koke' and Coca-Cola.' I know a number of others, 'My-Cola,' 'Ko-Nut,' 'Rye-Ola,' 'Gibb's Cola,'—that is a new one, just became acquainted with yesterday. I have known of cola drinks ever since I have been in the drug business,—about eight years. \* \* \* As a rule my customers come in and call for the drink they want, sometimes, and then at others they will come in and say, 'Give me a drink'; sometimes they will say, 'Give me my dope,' and any kind of—making sort of an application for a drink without designating just what they want. (Rec., 1228). \* \* \* I have had them come in and point at the bottle of 'Capudine' and say, 'Give me my dope,' or I have

had them point at 'Bromo-Seltzer,' 'Celery-Caffeine' or any of those headache salts, when they kind of establish themselves with a certain drink at the fountain, and in a good many instances when they come in they do not call it by its proper name, but, 'Give me a dose of my dope.' (Rec., 1229). \* \* \* I had some 'Ko-Nut' on hand at one time, but that was before your drink 'Koke' and 'Dope' came out. Customers in asking for that drink 'Ko-Nut' called for 'dope' and I gave them 'Ko-Nut.. At the time I handled other cola drinks, I understood customers wanted a coca drink when they came in and asked for a 'dope.' I did not consider that it designated any particular cola drink, and very often I would ask them to designate the kind of drink they wanted. (Rec., 1229-30). \* \* \* When a customer came into my store and asked me for a 'dope' I did not consider that he had made a definite and specific request on me to serve him with 'Coca-Cola' and nothing else." (Rec., 1231).

DR. J. G. PYLE, a retail druggist, Dallas, Texas, (Rec., 176):

"I do not remember when the name 'coke' got to be used. You hear it oftener the last few years than you used to. (Rec., 1725). \* \* \* There used to be a lot of talk about cocaine in 'Coca-Cola,' and people used to ask if it had cocaine in it, and that stuff."

ADAM DIEHL, manufacturer of "Star-Cola," Nashville, Tenn. (Rec., 1082-7):

"We manufacture a cola drink, 'Star-Cola.' We have been putting out that drink about fifteen years. We make syrup for the making of the drink. We

sell it to soda fountains and bottlers,—advertised around town and all over the United States, in the Bottler's Gazette, and that is supposed to go to every bottler in the United States. Around in Nashville we have advertised it on bill boards, daily papers, programs, these slides in picture shows. 'Star-Cola' is sold at the baseball park exclusively. We have a large sign right opposite the grand stand, which shows *'Diehl & Lord's Star-Cola and Pepsin sold exclusively on these grounds.'* We have ten or fifteen boys taking it through the audience, and they have it on their buckets, and printed across the face of their caps, and then the boys are all instructed,—and which they do,—when they go selling it [to call out] 'Diehl & Lord's ice-cold "Star-Cola" and "Pepsin" and "Digestol,"'—the three drinks we sell there. We advertise also on the program. We advertise our drinks as sold exclusively at the ball park; we make that our specialty in the advertising. Customers say, 'Give me a dope,' 'two dopes,' 'a Pepsin Nut,' or 'Digestol,' if there is four, —some call for 'Star-Cola' and some say 'Give me a bottle of cola.' When they ask for 'dope,' 'Star-Cola' is served. They know, when they ask for 'dope' and are served 'Star-Cola,' that it is not Coca-Cola,' by the boys calling 'Diehl & Lord's Star Cola,' by the advertising on the sign, too, and by the advertisement I have put on the program that 'Star-Coa' is sold exclusively on the grounds. On the bottle is 'Diehl & Lord's Star-Cola.' The crown has also 'Star-Cola' on it. The label is blown in the glass. When a customer asks for a 'dope,' I understand that he wants any cola drink. I do not regard the name 'dope' as a specific and definite name for 'Coca-Cola' exclusively. I would take it from experience,—my experience has been,—when they



call for 'dope' they want ours, or whatever we have got; when they want a cold drink, they will say give me a 'dope' or 'coke,'—some nickname of that kind. If a customer came into my place of business and asked for a 'dope,' I would understand he wanted a box of cola drinks. There are forty or fifty other cola drinks on the market today that I know of, I could not mention them all. I have known of cola drinks on the market, I suppose, twenty-five years. (Rec., 1082-3-4). \* \* \* When I talk about 'dope,' or 'coke,' either, it usually refers to a cola drink with me. It does not mean any special one. When I saw 'Koke' or 'Dope,' it would mean with me, as a bottler, if I was going to bottle the stuff and wanted call for 'Koke Syrup; but the general public, when they are at the parks, for instance, they would call for 'dope,' that would mean they want a bottle of cola. I have heard them call it 'coke' and 'dope.' That is what they mean down there,—we only sell three drinks, and, when they call for 'coke' or 'dope,' the boy knows he means a cola drink." (Rec., 1086-7).

W. F. BOYLIN, president of the American Label Words, Nashville, Tenn. (Rec., 1074-5):

"When I go into a soda fountain, or place where they sell bottled cola drinks, or soft drinks in bottles, and ask for a 'dope,' I expect to get a cola drink. If I want 'Celery-Cola,' I know I have got to ask for Celery-Cola. \* \* \* If I go in and ask for 'a coke,' I expect to get any cola drink. I do not regard the names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I have heard these words 'coke' and 'dope' for ten, or twelve, or fourteen, years anyway,—fifteen years, I should

say. I regard them as nicknames for cola drinks as a class. \* \* \* Out to the base ball park here in the summer time there is no cola drinks sold there except Diehl & Lord's 'Star-Cola.' That is sold in bottles. I have heard them ask for it as 'coke' and 'dope.' \* \* \* They always have signs out there, and have crowns on the bottles the boys bring out in the stand, with the name on it. When people ask for 'dope' or 'coke' and are served with 'Star-Cola,' I think they know they are getting 'Star-Cola.' I have heard it asked for as 'coke' or 'dope,'—nearly always in calling for a drink out there, I say, 'Give me a coke,' or 'a cola.' I do not think I am getting 'Coca-Cola' when they serve it to me. People in asking for a drink at the ball park by the names 'coke' or 'dope' can tell they are getting 'Star-Cola,' and that it is not 'Coca-Cola,' by the crown on the bottles, and the advertising in the park that Diehl & Lord have exclusive rights there to sell Diehl's 'Star-Cola.' Diehl & Lord have their name blown in the bottle." (Rec., 1074-5).

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville, Tenn.:

"I have dispensed 'Fletcher's Cola,' 'Diehl's Star-Cola,' and some other names. \* \* \* I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. I have had customers come in and ask for drinks by other nicknames. Some of the names they asked for [are] 'coke,' 'dope,' 'poison,' 'shot.' When they came in and asked for drinks by those names, they wanted any kind of drink they could get,—any kind of cola drink,—it did not make any difference. I did not consider,

when they came in and asked for a 'coke,' a 'dope,' a 'shot,' 'poison,' any of those names, that they were making specific requests for 'Coca-Cola' and nothing else. I regard those names as nicknames common to the trade, referring to cola drinks as a class. (Rec., 1119). \* \* \* At the baseball park here at Nashville they serve 'Diehl's Star-Cola' in bottles. They ask for 'coke' and they give them that. It has a red label on the bottle. The bottle has a big label on the side of it. They ask for that by 'dope' and 'coke.' I never hear any one who asked for it by 'dope' or 'coke' reject it on the ground that it was not what they asked for. They mostly call for it by 'dope' and 'coke,' for it is advertised in the park. They have a large advertisement that says 'Call for Diehl's Star-Cola.' The boys carrying the containers they have for the bottles, they have labels all over the sides, 'Diehl's Star-Cola only.' The people who ask for 'dope' know they are getting 'Star-Cola.' (Rec., 1120) \* \* \* Zeh's had 'Coca-Cola' and 'Diehl's Star-Cola.' When a man asked for 'Coca-Cola,' I served him 'Coca-Cola,' and if a man asked for 'dope' I served him 'Diehl's Star-Cola.' Rec., 1121) \* \* \* 'These other drinks, they are sold in bottles, that they ask for as 'coke' or 'dope.' They had great long names, and a person would not go to the trouble of calling for them, they would just call for a 'coke' or a 'dope' and get them. \* \* \* At the places where I was and they served only 'Coca-Cola,' when people came in and asked for a 'coke' or 'dope,' I gave them 'Coca-Cola,' because it was all I had." (Rec., 1122).

ABRANTS DARDEN, soda dispenser at Henry Skagg's, Stahlman Building, Nashville, Tenn.:

"I have been a soda dispenser for about six years. Have dispensed a great many different kinds of drinks, I could not tell all of them. The cola drinks I have dispensed are 'Fletcher's Cola,' 'Dope,' 'Coca-Cola,' and others. I cannot remember. I have known of these other cola drinks, other than 'Coca-Cola,' most ever since I have been in the business. I have had calls for drinks under the name of 'dope' and 'coke' at the soda fountains where I have worked. I have had customers come up and say, 'Give me a coke,' or 'Give me a dope.' I have had other names used. A lot of them will say, 'Give me a shot-in-the-arm; and different thinks like that. I do not regard the words 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. When a customer comes into my soda fountain and asks for a 'coke' or a 'dope,' I do not understand that he has made a definite and specific request on me for 'Coca-Cola' and nothing else. The word 'dope' means to me some cola drink, a drink of *that order*. In the places where I have worked and handled 'Fletcher's Cola,' and other similar drinks, when a customer came into my establishment and asked me for a 'dope,' I served him 'Fletcher's Cola' at time when he asked for 'dope.' At the different fountains where I had other cola drinks than 'Coca-Cola,' and customers came in and asked for 'dope,' I generally gave him what I made the most money on, when they call for a 'dope' or a 'coke.' I go out to the baseball park occasionally. 'Star-Cola' is sold out there. Out there I have heard them call for 'dope,' things like that, and that is what they gave me. I have heard them asked for it, 'Give me a dope'—'three dopes'—as many as they wanted, or 'Give me a cola,' or 'a coke.' (Rec., 1123-4 \* \* \* When they call for 'coke' or 'dope,' as I told you, I

would give them the first cola drink I came to, according to what I was handling at that time. When they called for 'coke' or 'dope' I would give them some cola drink that we handled and was nearest to me, and sometimes 'Coca-Cola.' \* \* \* At Skaggs' place we carry 'Coca-Cola' now, that is all; we do not carry 'Fletcher's Cola.' When they call for 'dope' or 'coke,' we give them 'Coca-Cola.' \* \* \* What the people wanted when they asked for 'coke' or 'dope,' I always thought they meant something on the cola drink line, some kind. 'Fletcher's Cola' is cheaper than 'Coca-Cola.' That is *one* reason why I served 'Fletcher's Cola' for 'dope' and 'coke,'—and *because it is a cola drink.*" (Rec., 1126-7).

P. E. JOHNSON, soda dispenser, Nashville, Tenn.:

"We dispense sodas of all different flavors. We dispense 'Cola-Cola' and a black syrup called 'Dope.' They used 'Fletcher's Cola,' and have used 'Diehl's Star Cola.' \* \* \* When customers come into our fountain and ask for a 'coke' or 'dope,' we serve them 'coke' or 'dope.' When we handled 'Fletcher's Cola' and they asked for 'coke' or 'dope,' we served 'Fletcher's Cola,' and when we were handling Diehl's 'Star-Cola,' we served Diehl's. When I was serving these drinks in response to their requests, I considered I was giving what they asked for. The name 'coke' or 'dope' means fifty, or a hundred, or more, drinks in a class. They mean a class of drinks. I do not consider that when a man comes into our fountain and asks for a 'coke' or a 'dope' that he is making a definite and specific request on me for 'Coca-Cola' exclusively. Some of the cola drinks I know of are: 'Afri-Cola,' 'Gay-Ola,' 'Fletcher's Cola,' 'Diehl's Cola.' And I know there are a num-

ber of different ones on the market but I do not recall their names. I have heard these names, 'coke' and 'dope,' applied to soda fountain drinks since I have been going around and calling for drinks myself. \* \* \* At the baseball park here in the summer they serve 'Pepsin' and Diehl's 'Star-Cola' and the other drinks that run in that class. Diehl's 'Star-Cola' and the other drinks that run in that class. Diehl's 'Star Cola' is all that is advertised out there. The boys holler: 'Star-Cola,' Diehy's 'Star-Cola!' \* \* \* If people ask for 'coke' or 'dope' at the ball park, they get Diehl's Cola. When they get Diehl's Cola they know they are getting that because it is labeled. (Rec., 1151-2). \* \* \* When I went there and a man came in and asked for a 'coke' or a 'dope,' I would not know what he wanted. There are so many so-called 'cokes' and 'dopes' on the market, and one specific 'Coca-Cola,' I would not know, I could not state positively what he might want, but I imagine, from the advertisements, etc., that he would call for 'Coca-Cola' if he wanted 'Coca-Cola.' "

J. E. DUNN, a soda dispenser, Nashville, Tenn.:

" 'Star-Cola' is about the only cola drink I have ever dispensed to amount to anything, except 'Coca-Cola.' I have known of other colas on the market ever since I have been in the business, and that has been about seven years. Some of the other cola drinks I know of are 'Fletcher's Cola,' 'Star-Cola,' 'Matthew's Cola.' We do have, and have had customers at the other places, come into the soda fountain and ask for a 'dope' or a 'coke.' When I was dispensing 'Star-Cola' and they asked for 'coke' or a



'dope,' I would give them "Star-Cola," because it was the only one I had, and I considered that I was giving them what they wanted, because they practically all knew what I had. I did not consider that he had made a specific and definite request for 'Coca-Cola' only. \* \* \* The words 'coke' and 'dope' means, as applied to a soda fountain beverage, different kinds of drinks,—all this kind of stuff that is trying to imitate 'Coca-Cola,—it refers to the 'dope' drinks as a class." (Rec., 1157-8-9).

W. W. RANDOLPH, a soda dispenser, Nashville, Tenn. :

"Some of the cola drinks that we have dispensed are 'Star-Cola,' 'Mi-Cola,' 'Pepsi-Cola,' and I guess about a dozen others. \* \* \* I have heard of about a dozen cola drinks on the market several years back,—as well as I can remember, about eight years, anyway. In asking for the cola drinks at our fountain, customers most all of the time call for 'dope.' When they call for 'dope' I give them any of those cola drinks I happen to have at that time. \* \* \* When customers come in and ask for a 'coke' or a 'dope,' they want any of those colas, unless they specify one certain drink. I do not regard the words 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. When a customer came into our fountain, while I was dispensing there, and asked for a 'coke' or a 'dope,' I did not consider that he had made a specific and definite request on me for a 'Coca-Cola' only. \* \* \* They dispense cola drinks at the baseball park. They serve Diehl & Lord's cola there,—that is served in bottles. They call for a 'dope' or a 'coke' or just any of those names, in asking for it out there, and are served with this Diehl

& Lord's cola there. I never heard any one object to it and say it is not what they wanted, when they were served with it in a call for a 'coke' or a 'dope.' \* \* \* The word 'coke' or 'dope' is used for all these drinks. I use it to apply to these different drinks. I do not think they only mean 'Coca-Cola' when they ask for a 'dope.' If they call for a 'dope,' they do not mean 'Coca-Cola,' they mean any line of these drinks." (Rec., 1160-1).

J. M. SMITH, proprietor of lunch room and soda fountain, Nashville, Tenn.:

"I dispense everything that they sell over a soda fountain, a general line of soda fountain drinks, and the different kinds of coca-cola and other cola syrups. I have dispensed 'Gerst's Cola,' 'Gay-Ola,' 'Star-Cola,' and now a new syrup,—cola drink,—put up by the Southern Fountain Supply Co., I do not remember what they call it. Customers calling for these cola drinks invariably ask for 'dope.' I have a good many customers who come in and ask for a 'Coca-Cola,' and some ask for 'dope' and some ask for 'coke,' and names like that. I give them, when they ask for 'dope' or 'coke,' either 'Star-Cola' or 'Gerst's Cola,' or some one of these cola syrups. I have given 'Coca-Cola' under the name of 'dope' and 'coke.' \* \* \* When customers ask for 'dope' or coke,' I understand it is any kind of a cola drink, — not a definite and specific request for 'Coca-Cola' exclusively. I am now dispensing a cola syrup that is put up by the Southern Fountain Co. I do not remember what they call it; it is put up by Mr. Matthews, I believe, \* \* \* I call this cola syrup 'dope.' He sells it to me under that name. I understand 'coke' or

'dope' is attributable to any kind of cola drink \* \* \* I have heard these words 'coke' and 'dope' applied to soda fountain beverages ever since I can remember,—about fifteen years, something like that. I have been working in and around soda fountains for about that length of time. The greater part of the time I have had other cola syrups on the fountain as well as 'Coca-Cola' syrups. I never had a customer reject any of the other drinks, other than 'Coca-Cola,' when they have asked for it as 'coke' or 'dope' and I served it to him in response to a request for 'coke' or 'dope,' on the ground that it was what he asked for. They serve 'Star-Cola' at the ball park exclusively, and have done so the last two or three seasons. They ask for it as 'dope,' and they serve them 'Star-Cola.' \* \* \* 'Star-Cola' is blown in the bottle. The boys call 'Star-Cola.' I have heard some men say, 'give me a dope,' and they would sell them this 'Star-Cola' they were peddling. \* \* \* When customers ask for 'coke' or 'dope,' I think they are asking for any kind of cola drink." (Rec., 1182-4).

J. C. PRICE, formerly soda dispenser, but now running a restaurant, Nashville, Tenn.:

"There are many different brands of cola drinks I have served. I could not call them all, I know a few,—'Arrow-Cola,' 'J. D. F. Cola,' 'Koke and Cola,' 'Gay-Ola,' 'Afri-Cola,' and I have dispensed 'Star-Cola' and 'Gerst's Cola,' too, and 'Coca-Cola.' I have worked here in Nashville, St. Louis, Evansville and Birmingham. At these different towns I sold different cola drinks. (Rec., 1205). \* \* \* The words 'dope' and 'coke' mean, in my opinion, a cola drink containing caffeine. I have had customers

come in and call for a 'dope' and call it by its name, —for instance, 'J. D. F. Cola,' or 'Koke and Kola,' —they would prefer it to 'Coca-Cola.' \* \* \* I have been out to the ball park here; they sell and advertise 'Star-Cola' out there. I have heard people out there, patrons, asking for 'dope' and coke.' I have hollered at the boy to give me a bottle of 'dope,'—I call it 'dope,'—and he would give me 'Star-Cola.' You could tell by the bottle they were not giving you 'Coca-Cola.' It said 'Diehl's Star-Cola' on the bottle, and on the crown. (Rec., 1206). \* \* \* I do not consider, when I go into a soda fountain and ask for a 'coke' or 'dope,' that I am making a definite and specific demand upon the dispenser to give me a 'Coca-Cola' and nothing else, because, if I wanted a 'Coca-Cola,' I would ask for it when I went in. (Rec., 1208). \* \* \* I do not consider when a customer asks for a 'coke' or 'dope' that he has asked specifically for 'Coca-Cola.' " (Rec., 1209).

W. M. SIDEBOTTOM, in the confectionery and soda water business for thirty years, and now manager of Skalowski's, Nashville, Tenn.:

"At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola,' we dispense no others besides that. I have heard customers come in and ask for 'dope' or 'coke;' they did it every day. Fifteen or eighteen years ago when they came in and asked for 'coke' or 'dope,' it depended upon the humor of the dispenser what he gave them; he would give them 'Coca-Cola,' or whatever kind of cola we may have on hand. My opinion is that 'coke' and 'dope' apply to any cola drink, and when a man comes into a soda fountain and asks for a 'dope' or 'coke,' I do not consider that he has made a definite and

specific request for 'Coca-Cola,' but a cola drink, and that has been true for fifteen years anyway. The firm of Dorider & Sidebottom had the concessions at Glendale, and we dispensed, my recollection is, about three kinds of cola, 'Celery-Cola,' 'Coca-Cola,' and I think there was another cola on the market then. My impression is that we had three kinds of cola. Away back there if they asked for 'dope' or 'coke,' we would give them either one we had." (Rec., 1163).

J. G. BOOTH, soda dispenser, Nashville, Tenn.:

"We are dispensing 'Coca-Cola' straight at the place where I am working now. I have known of cola drinks ever since I have known the original Coca-Cola; I suppose it would be five or six years. Customers come into the soda fountain and ask for a 'coke' or a 'dope,' and call for lots of different names, as 'coke,' 'dope,' 'shot-in-the-arm,' 'shoot me,'—anything like that,—and 'Coca-Cola.' (Rec., 1169). \* \* \* When a customer came into our place of business and asked for a 'dope' or a 'coke,' I would think he was asking for a 'dope' or a 'coke,'—there are so many different ones on the market, I would think he was asking for a class of drink, instead of some specific drink. If he wanted the original 'Coca-Cola,'—if he is that particular about it,—he ought to call for it under the real name of 'Coca-Cola.' (Rec., 1170).

MATT WILSON, a retail druggist, Nashville, Tenn.:

"I dispense 'Gerst's Cola.' (Rec., 1209). \* \* \* I do not handle any other cola drink. Customers coming in and asking for that drink ask for a 'dope,'—'give me a dope.' I serve them, in response to that request, this 'Gerst's Cola.' When customers

come in and ask for a 'dope,' I do not consider they are making a definite and specific request for 'Coca-Cola;' if they did, they would ask for 'Coca-Cola.' I have had some few ask for 'Coca-Cola,' and I would tell them that I did not have it, and they would say, 'give me some of that other dope.' Before I went into the drug business I was in the saloon business. Ever since I can remember we handled cola drinks there. 'This 'Gerst's Cola,' I had the syrup and made it just like I do now,—made it from the syrup drawn from a spigot by adding carbonated water. Customers used the name 'dope' in asking for it there. Some did not know what it was; they would say, 'It is better than I can get at a soda fountain.' I said, 'This is Gerst's.' " (Rec., 1209-10).

F. H. WILLIS, soda dispenser, Nashville, Tenn.:

"We have customers come into our soda fountain and ask for a 'dope' or a 'coke.' I give them a cola,—'Candy-Cola.' (Rec., 1191). \* \* \* When a customer asks for a 'coke' or a 'dope,' my understanding is that he wants just some cola that we might have, that we dispense there. When they ask for 'coke' and 'dope' and I serve them 'Candy-Cola,' I consider we are giving them what they ask for. \* \* \* 'We have always dispensed 'Fletcher's Cola.' They ask for that as 'dope' and 'coke.' I do not regard the names 'coke' and 'dope' as the names of a particular cola drink." (Rec., 1192).

WILLIAM F. DAVIS, a practicing attorney of the Nashville Bar, and president and general counsel of the Davis-Fuston chain of drug stores, Nashville, Tenn.:



"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola,' 'Afri-Cola,' 'Fletcher's Cola,' 'Ala-Cola,' 'Arrow-Cola,' I believe it is,—'Star-Cola,' 'Gerst's Cola,' not all of those at every place,—at different places at different times we have used these cola drinks. \* \* \* I frequently hear customers come in and ask for a 'coke' or 'dope.' My instructions to the men are to sell the drink they think will give the best satisfaction. I do not instruct them to sell any particular brand of drink when a customer asks for a 'coke' or 'dope.' We give the one that has given the best satisfaction in the neighborhood,—that is sometimes not the same drink in different neighborhoods. When customers come in and ask for a 'coke' or a 'dope' at our fountain, we do not understand they are making a definite and specific request for 'Coca-Cola' exclusively. (Rec., 1102). \* \* \* I do not think we ever had anybody reject any of the cola drinks we served them when they asked for them as 'coke' or 'dope,' on the ground that it was not the drink they asked for. Occasionally customers who come into our store and ask for drinks as 'coke' or 'dope,' and indicate to us the particular brand of drink they want. I think probably here 'Fletcher's Cola' is called for maybe more than any other, except 'Coca-Cola.' \* \* \* I do not regard the names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I regard them, particularly 'dope,'—as a common name [applicable] to a class of drinks,—the caffeine or cola drinks. When a man comes into our establishment and asks for a 'coke' or a 'dope,' and is served with 'Star-Cola,' 'Fletcher's Cola,' or any other cola drink at our fountain, I consider that we are giving him what he is asking for." (Rec., 1103).

SUMNER FUSTON, a stockholder in the Davis-Fuston chain of drug stores at Nashville, Tenn., and manager of one of the stores:

"We have customers come into our store and ask for 'coke' or 'dope.' We serve, when they ask for 'coke' or 'dope,' 'Fletcher's Cola.' \* \* \* I handled *Atlanta* 'Coca-Cola' because I was out of 'Fletcher's Cola,' and Fletcher could not get it to me as quickly as I liked, so I ordered a gallon out from Spurlock Neal with my regular morning order. Well, the trade was just not satisfied with it. They kicked on it. I knew they were not use to it, because I had always served the other, so I did not serve it any more. The other syrup always appeared to be a richer syrup, a heavier bodied syrup and seemed to suit them. That was why I quit handling *Atlanta* Coca-Cola. I have a sign up at the fountain saying I handle Fletcher's Cola. I have had it up there for a long time. I know this, the trade is satisfied with it. I have been serving them for years and they do not know anything else except what I have been serving them. I have a line of trade that I have been doing business with for years, ever since I have been there. \* \* \* I had the *Atlanta* Coca-Cola complained of as not what was asked for when it was served to a man in response to a request for coke or dope."

GEORGE R. EDMONDSON, retail druggist, Atlanta, Georgia:

"If a man comes into my store and asks for a 'dope,' I think he wants a cola.'" (Rec., 1301).

J. L. DRAKE, head dispenser at Nunally's, Birmingham, Ala. :

"I have been a soda dispenser for about ten years. I have dispensed 'Coca-Cola,'—that is the only one. I have heard of several other cola drinks on the market,—quite a few. Some of them are 'Rye-Ola,' 'Gay-Ola,' 'Chero-Cola.' If I had 'Coca-Cola' in the fountain and 'Rye-Ola' in the fountain together,—not in the same container, but in the same fountain,—and a customer should come in and ask for a 'dope,' I would give him the one I made the most money out of, if he asked for a 'dope.' \* \* \* If he asked for a 'dope' and I served him with 'Rye-Ola,' I would consider I gave him what he asked for. \* \* \* I do not consider 'dope' specifies any particular drink. I have never termed it that way. \* \* \* I handle root beer at our fountain. It is made by the John Hungerford Smith Co. I have never dispensed any 'Hires' root beer. I was in stores where it was dispensed. 'Hires' root beer is extensively advertised. If they specify 'Hires' root beer, we have not got it, but if they just ask for *root beer*,—if they do not specify '*Hires*,'—we give what we serve. If I had two root beer,—this root beer I now have and '*Hires*' root beer,—and a customer came in and said, 'give me a *root beer*,' I would give him the cheaper article. I would consider I had given him what he asked for." (Rec., 1403-4).

R. A. THORN, retail druggist, Meridian, Miss. :

"I dispense all of the different drinks,—lemon, orange, vanilla, 'Coca-Cola,' 'Dope' and 'Koke' syrups. I get this 'Dope' syrup and this 'Koke' syrup from the Southern Koke Co., New Orleans.

Other cola drinks that I have handled are 'Ko-Nut,' 'Coca-Cola' and 'Afri-Cola.' (Rec., 1420). \* \* \* When customers come in and ask for 'dope,' I do not consider that they are making a definite and specific request on me to serve them with 'Coca-Cola' exclusively. When I was handling 'Coca-Cola' exclusively, and they asked for 'dope,' I served them with 'Coca-Cola,' because that was the only cola syrup I handled at that time. If I had had any other cola syrup at that time, and they asked for a 'dope,' I would have served them the first cola syrup that was in reach of me, I guess,—the one most convenient. What I have just said applies to 'coke' just as well as it does to 'dope.' At that time it was the only cola syrup known and the only cola syrup supposed to contain any drug or 'dope,' and I therefore thought they were specific requests for 'Coca-Cola.' That was before I heard of the others; before any other cola syrup was on the market around here, so far as I know." (Rec., 1425-6).

H. F. CRISLER, a retail druggist, Jackson, Miss.:

"I handle 'Coca-Cola' and 'Dope.' I get this 'Dope' from New Orleans, the Southern Koke Co. I handled 'Ko-Nut.' Customers come in and ask for a 'Coca-Cola' if they want the genuine 'Coca-Cola;' if they want some other cola drink, they ask for a 'coke' or a 'dope.' I know I am giving them what they want, because that satisfies them, and if I serve them 'Coca-Cola' it does not satisfy them. I have had customers come in and ask for a 'dope' and I served them with 'Coca-Cola,' and they would say it did not satisfy them, or reject it. It has occurred quite often, when we would be out of the 'Dope' syrup and have to use 'Coca-Cola,'—quite often we

would have complaints on the syrups, on the drink they were getting,—almost invariably from the regular customers.” (Rec., 1426-7).

H. M. TODD, a retail druggist, Jackson, Miss.:

“We dispense just one cola drink, ‘Kø-Nut,’ out of Atlanta. The fellow I bought out used it and I continued using it. Mr. Clark, who was traveling for them, quit the ‘Ko-Nut’ people, and started in business for himself and went to manufacturing a ‘dope’ of his own,—‘Miss-Ola,’ I believe. I used one barrel of it, which did not give us satisfaction, and we quit, and we started using a preparation put up by the Southern Koke Co., called ‘Koke.’ Our customers, in asking for these cola drinks, ask for ‘dope’ and ‘coke.’ I give them ‘Dope,’ all we have got. I mean by ‘Dope,’ this New Orleans product, of the Southern Koke Co. Before I began to handle that, when they asked for ‘dope’ or ‘coke,’ I gave them ‘Ko-Nut.’ When our customers asked for ‘dope’ or ‘coke,’ and I served them either ‘Dope’ or ‘Koke’ made by the Southern Koke Co., of New Orleans, in a way I considered I was giving them what they asked for,—something on the same order as dope. We never had any customers turn it down or reject it, when served to them in response to calls for ‘dope’ or ‘coke,’ on the ground that it was not what they asked for. We have had them to send back ‘Coca-Cola’ and ask for ‘Dope.’” (Rec., 1438).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss.:

“We are dispensing ‘Coca-Cola,’ and we have one called ‘Koke’ and ‘Dope.’ ‘Koke’ and ‘Dope’ is

shipped from New Orleans, from the Southern Koke Company, Limited. I have dispensed 'Ko-Nut' syrup. It is a cola drink. (Rec., 1442). \* \* \* When customers come into my place of business and ask for a 'dope' or a 'coke,' I do not consider that they are making a definite and specific demand on me for 'Coca-Cola' exclusively." (Rec., 1449).

HUGH LEE BOYD, a retail druggist, Kosciusko, Miss.:

"I am dispensing the Southern Koke Company's 'Koke' or 'Dope,' and 'Coca-Cola.' I have dispensed this Hagan & Dodd drink, 'Ko-Nut.' Customers indicate to me that they want a cola drink by asking for a 'coke,' 'dope,' 'give me a shot,' and things like that. When customers come in and ask for a 'coke,' 'dope,' or a 'shot-in-the-arm,' or 'shot,' I do not understand or consider that they are making a definite and specific request on me for 'Coca-Cola' and nothing else. (Rec., 1450-51). \* \* \* 'Dope' and 'coke,' 'cola,' and 'shot-in-the-arm,' mean any cola drink. I have been hearing it ever since I have been big enough to hear. I always had my mind made up that way. I think they are nicknames for any cola. I think they could be nicknames for 'Coca-Cola' as well as nicknames for 'Gay-Ola' or 'Dope.' I never thought they applied exclusively to 'Coca-Cola.' (Rec., 1453). \* \* \* The public at large mean by 'coke and 'dope' *any cola* drink, because *they come under that head.*" (Rec., 1454).

C. J. THORNTON, a retail druggist, Hattiesburg, Miss.:



"I dispensed at my soda fountain a general line of all flavors, and I sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Luck-Ola.' I never sold any 'Gay-Ola.' When customers came into my soda fountain and wanted a cola drink, I kept track once, and 90 per cent. would call 'dope.' When they called for 'dope,' I would give them anything I had in the line of 'Ko-Nut' and 'Gay-Ola,'—I mean 'Afri-Cola,'—'Koke' or 'Dope,' any cola drink. When my customers came in and asked for 'dope' and I served them 'Ko-Nut' or 'Luck-Ola,' I considered I was giving them what they asked for. I never had any customers refuse any drink served, when asked for 'dope,' on the ground it was not what he asked for. (Rec., 1859). \* \* \* When customers come in and ask for a 'dope,' I do not consider they are making a definite and specific request on me for 'Coca-Cola' exclusively. Take 'Dr. Pepper's,' that is the first I ever heard called 'dope,' and, oh, that has been about five years ago, I was in Shreveport, I heard it called 'dope.' \* \* \* 'The word 'dope,' as applied to a soda fountain beverage, means any cola drink." (Rec., 1760).

J. E. JONES, a retail druggist, Hattiesburg, Miss.:

"I have dispensed 'Coca-Cola,' made by the Coca-Cola Co., and 'Ko-Nut,' by Hagan & Dodd and made in Atlanta. When customers came in and asked for these cola products, the average run of customers ask for 'dope' or 'coke,'—'dope,' usually. I served 'Ko-Nut' when I handled it. \* \* \* When customers came in and asked for a 'dope' and I served them with a 'Ko-Nut,' I considered that I gave them what they asked for at that time. \* \* \* I cannot remember that we ever had a customer to refuse 'Ko-Nut'

when served him on requests for 'dope' or 'coke.' (Rec., 1796-7). \* \* \* I have never considered, when a customer came in and asked for a 'dope' or a 'coke,' that se was making a definite and specific request on me for 'Coca-Cola' exclusively." (Rec., 1801).

E. J. WILLIAMS, a retail druggist, Hattiesburg, Miss.:

"We dispense 'Dope,' 'Koke,' 'Ko-Nut' and 'Coca-Cola.' This 'Koke' and 'Dope' are from the Southern Koke Co. When customers come in and ask for 'coke' or 'dope,' we give them 'Koke' or 'Dope.' If a customer comes into our drug store and asks me for either a 'coke' or a 'dope,' I do not consider that he has made a definite and specific demand on me for 'Coca-Cola' exclusively. When he asks for a 'coke' or a 'dope,' and I serve him this New Orleans product, I think I give him what he asked for. I have never had a customer reject the New Orleans product, 'Koke' or 'Dope,' when he asked for it as 'coke' or 'dope,' on the ground it was not what he asked for." (Rec., 1807-8).

W. A. HICKMAN, a retail druggist, Monticello, Miss.:

"We dispensed 'Coca-Cola,' 'Dope' and 'Koke.' \* \* \* When customers come in and want a cola drink, they use different names,—'coke,' 'dope' and 'Coca-Cola.' \* \* \* The word 'dope' means, as applied to a soda fountain beverage,—why, I do not know, I do not guess it means any particular brand. (Rec., 1821). \* \* \* When a customer calls for a 'coke' or a 'dope,' they want any cola drink. \* \* \* A lot of people call for 'coke' or 'dope' and do not know what they want. I have asked several. Asked what

kind of drink you want. They say, I don't know, anything,—what kind of cola do you sell here? (Rec., 1823). \* \* \* I do not know whether a man wants Coca-Cola or not when he calls for 'dope' or 'coke.' \* \* \* and the reason [why] I do not know what they want when they ask for 'dope' or 'coke' [is that] they do not designate any specific drink."

A. S. GOODY, a retail druggist, and mayor of Lucedale, Miss.:

"I dispense 'Dope' and 'Coca-Cola.' This 'Dope' is bought from New Orleans,—the product of the Southern Koke Company, Limited. I consider the word 'dope' means anything in that line,—of 'Coca-Cola' or cola beverages,—like 'Ko-Nut,' 'Afri-Cola,' 'Gay-Ola,' any of those cola drinks,—rather an indefinite term. It does not mean any specific one,—no specific brand of cola drinks." (Rec., 1786).

BURTON JONES, a retail druggist, St. Elmo, (a suburb of Chattanooga) Tenn.:

"I have had calls for 'dope' at my establishment. When a customer asks for a 'dope' he wants a cola drink of some kind. \* \* \* When customers come to my store and ask for 'a dope' we serve 'Coca-Cola.' \* \* \* At the time we had 'Tru-Cola,' we usually gave 'Tru-Cola.' They were satisfied with it,—anyway I gave them the 'dope.' None of them ever refused 'Tru-Cola' on the ground that it was not what they asked for. (Rec., 1006). \* \* \* Up to the time I started handling 'Tru-Cola,' three years before January 8, 1914, I only handled 'Coca-Cola' and nothing else of that kind. Northern people would come in there and say, 'Give me a dope,' and, naturally,

we give them a cola drink, but they say that is not what they want. \* \* \* We have a great many tourists that call ice-cream soda 'dope,'—that is what they call it. Up to the time we put in 'Tru-Cola,' we served 'Coca-Cola' for 'coke' or 'dope.' \* \* \* I served them [the] only 'coke' or 'dope' I had, prior to the time I put in 'Tru-Cola,' and then, when I got two kinds, I served first one and then the other. If I had had any other cola drink on hand besides 'Coca-Cola' before I began handling 'Tru-Cola,' I suppose we would have done the same as I did do when I handled both. \* \* \* I handle cigars, also, and have customers come in and say, 'Give me a *cigar*.' If he does not point out some *particular brand* he wants, I usually give him a bunch of cigars made here in Chattanooga that costs us \$31.00 or \$32.00." (Rec., 1012-13).

C. H. JOUETT, a drug clerk at the Live & Let Live Drug Store, formerly at Miller Pharmacy, Chattanooga, Tenn.:

"I have served 'Coca-Cola' in response to requests for 'dope.' \* \* \* As a matter of convenience, when I have 'Ala-Cola,' 'Ko-Nut' and 'Coca-Cola' in the jars, I serve either one I feel disposed to. It is like going into a bar room and asking for a glass of beer; if I do not *specifically* ask for 'Hauck's' or 'Budweiser,' I get a glass of *beer*. \* \* \* If I go into a fountain and ask for 'a shot,' I do not care what he gives me, so long as it is a *cola* drink. If a customer comes to my store and asks for 'a shot,' he gets 'Ko-Nut' or 'Ala-Cola,'—any cola drink. That has been so at nearly all the places I have been with at fountains. At each fountain where I have been, when they asked for 'dope,' I just gave them any

of them, it did not make any difference." (Rec., 1054-5).

DR. H. O. NULL, a practicing physician and also proprietor of a soda fountain, Highland Park (a suburb of Chattanooga), Tenn.:

"We handle cola drinks. The only cola drink we have now is 'Coca-Cola,'—and 'Ko-Nut.' I have handled a number in my time. I have handled Wise-Ola and Luck-Ola at one time, and 'My-Ola.' I have handled 'Coca-Cola' during the time I have had the soda fountain. We have always handled some other cola drink. (Rec., 1063). \* \* \* My customers use a good many different names; now, I do not know whether it is particularly these cola drinks or not, but they come in and call for 'dope,' and 'coke,' and 'shot,' and 'Give me a dose of lead,' and everything else. When they use these names I believe it is generally known that they want a cola drink. When a man comes into my soda fountain,—a customer,—and asks for a 'dope' or a 'coke,' I do not understand that he has made a definite and specific request for 'Coca-Cola' exclusively. He has not asked for 'Coca-Cola.' When customers come in and ask for 'dope,' 'coke,' or 'shot-in-the-arm,' I serve what we have; if we have 'Coca-Cola,' if we have 'Ko-Nut,' we give them either one of them. \* \* \* I regard the names 'coke' and 'dope' as nicknames for that class of drinks,—that has always been my diagnosis of that class of drinks. I have never had any of my customers refuse any of my cola drinks that I have served in response to requests for 'coke' or 'dope,' 'shot,' or 'lead,' or anything of that sort, on the ground that it was not what they asked for." (Rec., 1064-5).

J. M. WHEELER, bar tender, Chattanooga, Tenn.  
(Rec., 970-2):

"I handle \* \* \* 'Coca-Cola,' 'Maud Muller,' 'Koke,' 'Rye-Ola,' and 'Tru-Cola.' \* \* \* I have had customers come into my place and ask for a 'dope,' and, when they do, I give them some kind of cola drink. I serve them the first thing that is handy when they ask for a 'dope,'—any kind of cola drink. I have served 'Rye-Ola' and 'Tru-Cola' when they ask for a 'dope.' When customers ask for a dope, I take it for granted they want some kind of cola drink,—they do not want any particular kind. I do not regard a request from a customer for a 'dope' as a specific request for 'Coca-Cola' exclusively. When customer come in and ask for a dope, I take it for granted that any kind of a cola drink will suit them. \* \* \* I have never had any of these cola drinks, other than 'Coca-Cola,' refused on the ground that it was not what they asked for, when a customer asked for a 'dope' and I served this other drink in response to that request. I am about my stand most all of the time so I can hear the requests my customers make for drinks that way; the customers ask for these cola drinks in just any kind of a name. 'What have you got, what kind of soft drink have you? Sometimes I will call over what I have for them and they will say, 'Any of them will do,—it doesn't make any difference to them. I serve near-beer to customers by nicknames, too. Some of the nicknames they ask for it by are: 'a glass of foam,' 'slop,' 'suds,' and so on. I do not regard that as a specific request for some particular brand of near-beer. They just want something out of the keg. I regard those names a general nicknames and applicable to that class of drink. 'Dope' is pretty



much the same way,—they just want something of that *kind* of drink; they don't mean any one drink when they come in and call for 'dope.' ” (Rec., 970-971-972).

E. W. FREEMAN, bar tender for thirteen years, Chattanooga, Tenn.:

“During all this time in Chattanooga, I have handled cola drinks. Some of the drinks are ‘Coca-Cola,’ ‘Rye-Ola,’ ‘Ala-Cola,’ ‘Maud Muller.’ \* \* \* I have been about the bar so I could hear the words customers used in asking for the different drinks they wanted. I am a bar tender, and have known of cola drinks, other than ‘Coca-Cola,’ possibly eight years, and perhaps longer. I have been handling other cola drinks since I have been in the saloon business,—the greater portion of the time. \* \* \* When customers come into my store and ask for a ‘dope,’ I give them most any dark colored bottled drink,—‘Koke,’ or that ‘Ala-Cola,’ it used to come handy, and I used to give a good deal of that ‘Maud Muller,’—I give all of these. (Rec., 973-974). \* \* \* I understand, when a customer asks for a ‘dope,’ that most anything you give him out of a dark bottle suits him just as well as if he had called for any particular name,—a drink of that class, a cola drink, a drink of that same general taste, color, exhilarating effect, and so forth. I take ‘dope’ in general as a name for all of those colored drinks. \* \* \* I have heard only ‘coke’ and ‘dope’ applied to these cola drinks. I have heard of these names, ‘coke’ and ‘dope,’ a fair estimate, of about eight years. \* \* \* I served beer at my establishment, and the names they ask for it by besides beer, are: ‘German courage,’ ‘suds,’ and such as that, something like

that. I do not regard requests for beer under those names as requests for any specific brand of beer. (Rec., 974-975). \* \* \* If a man came into my place of business and asked for a 'coke,' I would give him almost anything,—the first thing I got my hands on, if I was very busy. Sometimes I asked him if he wanted 'Coca-Cola.' He would say, 'Give me some dope, I don't care.' (Rec., 977).

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, Tenn.:

"When I first went into business I bottled a cola drink that I made myself,—practically five years ago; I didn't have any special name; the wagon men called it 'dope,' generally, in selling it to the trade, they would holloo, 'Give me a case of dope.' We didn't have any name on it,—just a plain crown and no label whatever, in a black bottle, and called it 'Dope.' We would throw it out if they called for 'coke;' we gave them the same thing, 'coke' or 'dope.' (Rec., 978-979). \* \* \* There is another one in town,—'L'Aroma,'—that is a dope drink. (Rec., 981). \* \* \* When I first come South was the first time I ever heard or knew of any 'coke' drinks whatever in any way." (Rec., 984).

A. F. ENSINGER, bar tender at Eagles Club, Chattanooga, Tenn.:

"I am about the bar so I can hear the names people use in asking for drinks they want. I dispense cola drinks. Some of the cola drinks I have dispensed are: 'Coca-Cola,' 'Koke,' 'Ala-Cola,' 'Tru-Cola,' 'Ozeola,' 'Maud Muller.' \* \* \* I have known of other cola drinks on the market for fourteen years

past. \* \* \* I have calls at my place of business under the name 'dope.' I generally give them a cola drink of that sort, whatever I have to give them. I do not know as they have made a specific request on me for 'Coca-Cola' and nothing else. I never had any customers reject any cola drink served to him in response to a request for a 'dope,' other than 'Coca-Cola,' on the ground that it was not what he asked for. I am still handling 'Coca-Cola.' I regard 'dope' as a name for that class of drink, and not a specific name for 'Coca-Cola.' I also dispense beer. 'There are numerous nicknames for it, such as 'suds,' 'Dutch disturbance,' and various other names. When a man comes in and asks for 'suds,' or 'Dutch disturbance,' I do not understand that he is asking for any specific brand of beer. \* \* \* I have heard the word 'dope' used long before I went into the bar tending business,—when I was still a baker. I understood the word 'dope' to mean, as applied to soft drinks, that they wanted a drink of that *kind*,—a *cola* drink." (Rec. 984-985-986).

TOM COLLINS, bar tender, Chattanooga, Tenn.:

"Some soft drinks we have are white soda, 'Koke,' 'Coca-Cola,' 'Poinsetta;' I think that is about all. I know of 'Ala-Cola' and this 'Maud Muller,' but we do not handle them any more. I have known of soft cola drinks on the market five or six years. (Rec., 988). \* \* \* Customers come in and ask for 'dope.' Of course they call all of them 'dope,' some of them do. \* \* \* When a customer comes in and [asks for a dope], I do not understand that he has made a specific and definite request for 'Coca-Cola' only. Lots of times they come in and say, give them a 'dope.' I ask them what kind. \* \* \* In dispensing, when

I have had customers ask for a 'dope,' and have dispensed to them a cola beverage other than 'Coca-Cola,' I have never had that beverage rejected on the ground it was not what they asked for. (Rec., 989). \* \* \* When a man comes in I ask him what *kind* of 'dope' he wants. Sometimes he says 'Koke,' and other time 'Coca-Cola.' We handled that 'Ala-Cola' and 'Maud Muller,'—they called 'Ala-Cola' 'dope,' too. I never had 'Ala-Cola' rejected by any of my customers, when asked for by the name of 'dope,' on the ground it was not what they asked for." (Rec., 990).

JOE QUINN, bar tender, Chattanooga, Tenn.:

"We handle 'Koke,' white soda, 'Poinsetta, and 'Sinalco,'—and this Panpepsin,' we have that, too. We get 'Koke' from the Chattanooga Bottling Co. 'Ala-Cola,' we handled that. Other cola drinks I handled besides that were 'Star-Cola,' 'My-Cola,' and the stuff made by Mayfield, and had some made by Gerst,—I forgot the name of it. I have known of 'Tru-Cola,' and other cola products on the market similar to 'Coca-Cola,' for ten or twelve years. (Rec., 991). \* \* \* All of them cola dopes, one is the same as another. (Rec., 992). \* \* \* It was well known that we did not handle 'Coca-Cola,' and still they asked for 'dope' and 'coke.' \* \* \* I have heard the name 'dope,' as applied to soft drinks, for seven or eight or ten years,—as long as I have been working around the business. In Nashville, when they asked for 'dope,' I gave them what we had in the house, \* \* \* if I had 'Gay-Ola,' I gave them that. When a customer comes in and asks for a 'dope,' I understand that he has made a request for what I have *in that line*; I do not regard the word 'dope'

as a specific and definite nickname for 'Coca-Cola,' no more than one of the others. I understand when customers ask for a 'dope,' they want anything we have got *in that line*. All of it is dope to me, I do not know one from the other. I do not know, I guess they call that 'Koke' 'dope,' I guess they call 'Coca-Cola' 'dope,' and they call 'Ala-Cola'—whatever we have got *in that line*, they call all of it 'dope.' Recently trade has been very strong for 'Koke.' (Rec. 933-4). \* \* \* *Lemon soda* is not known as a 'dope.' *Sarsaparilla* is not known as a 'dope.' *Root beer*, is known as *root beer*. '*Paupepsin*' is not known as 'dope,' neither is '*Poinsetta*' or '*Sinalco*'. (Rec., 995). \* \* \* When I handled 'Coca-Cola' by itself, and a man asked for a 'dope,' I gave him 'Coca-Cola,'—that was the only thing I had." (Rec., 996).

F. E. HOOPER, a retail grocer, Chattanooga, Tenn.:

"I have handled cola drinks. I have handled 'Coca-Cola,' I have handled 'Koke'—I handle 'Koke' now,—'Digestol,' and most all; I buy from all the wagons that go around town. (Rec., 997). \* \* \* I have had people come into my store and ask for 'dope.' When they ask for 'dope,' I say 'What kind of dope?' I do not understand they are asking for any particular kind of drink when asking for a 'dope.' I do not regard that name as a specific and definite name for 'Coca-Cola.' (Rec., 998). \* \* \* 'Coca-Cola' is the *oldest* 'dope' or 'coke' I remember." (Rec., 999).

M. J. COSTELLO, bar tender, Chattanooga, Tenn.:

"I have been handling soft drinks for ten years. \* \* \* I have handled white soda, 'Digestol,' 'Sinalco,' 'ginger-ale,' 'Ala-Cola,' 'Tru-Cola,' 'Koke,' 'Rye-Ola.' \* \* \* I have had customers come into my establishment and ask for 'dope' quite frequently. The last place I worked at did not handle any-



thing else but 'Koke' and 'Tru-Cola.' \* \* \* I give the first thing I get my hands on. It don't make any difference. What the customer wanted when he asked for a 'dope' was a soft drink,—some kind of '*coke*,'—unless they specify what they want, I give them the first I come to. You see the profits are about the same, and I just grab the first one I get my hands on. When a man comes into my establishment and asks for a 'dope,' I do not understand that he is making a definite request for 'Coca-Cola.' I think if he wanted 'Coca-Cola' and nothing else, he would call for 'Coca-Cola.' Other names customers use in asking for cola drinks are, 'give me a coke,' a 'dope,' a 'shot,' or something like that. (Rec., 1000-1001). \* \* \* If they say, 'give me a shot,' I would give them 'Tru-Cola' or 'Koke.' If I had 'Coca-Cola' I would give them that, or whatever I got my hands on. \* \* \* When I went to a soda fountain and asked for a 'dope,' I expected to get what he had *in that line*, whatever it was,—no particular brand. I regard 'coke' and 'dope' [as] nicknames for cola drinks as a class. (Rec., 1001). \* \* \* 'Coke' and 'dope' [are] both applied to any kind of *cola* drink." (Rec., 1003).

A. W. STANLEY, proprietor of Hotel and Bar, Chattanooga, Tenn.:

• "I have had customers come into my establishment and ask for a dope. I asked what kind of dope they wanted, some would say Coca-Cola, and some would say 'Give me some of that new drink of Reif's, that Maud Muller,' and such things like that, you know. If he would say a dope, of course, before Koke or any other drink was introduced, come in, and we only had Coca-Cola, I would understand that he wanted Coca-Cola. Lots of fellows would come in and say 'Give me a dope.' I would



say, 'What kind of dope do you want?' and he would say, 'Give me Coca-Cola,' or 'give me something else.' You know sometimes they call Coca-Cola dope, you know how these fellows are. Customers ask for cola drinks by saying, 'Give me a shot of cocaine.'" (Rec., 1005).

R. L. WAYMAN, bar tender, Chattanooga, Tenn. :

"I handle soft drinks in connection with my business, some of them being, 'Tru-Cola,' white soda, red soda, 'Maud Muller,' 'Poinsetta,' 'Sinalco,' 'Koke,' 'Dope,'—they call it 'Dope.' Other cola drinks I have known are 'Ala-Cola.' I have known of these other cola drinks ever since I have been in business \* \* \* I have customers come in and ask for 'dope.' I give them, when they ask for 'dope,' 'Dope,' 'Koke,' 'Tru-Cola,' 'Ala-Cola,'—something like that. \* \* \* They would ask for 'Coca-Cola' if they wanted it. \* \* \* If a customer comes into my establishment and asks me for a 'dope,' I do not consider that he has made a definite and specific request on me for 'Coca-Cola' and nothing else, they call all these soft drinks 'dope.' I never had any customers to refuse any other cola drinks, on the ground that it was not what he asked for, when he asked for a 'dope' or a 'coke' and some other drink besides 'Coca-Cola' was served, that I can recall. He can tell whether or not he is getting that or 'Coca-Cola.' The 'Coca-Cola' bottles here all have *the name on them, blown in the glass*, and the other bottles have not. \* \* \* I have had customers who came in and asked for 'dope,' and knew that they were not getting 'Coca-Cola,' and who seemed to be satisfied with what they got. (Rec., 1015-16). \* \* \* I am not positive whether it was here or in some other city, but I do remember seeing the crowns with 'D-o-p-e' on them. I have sold other

drinks when that was called for,—‘Tru-Cola,’ ‘Ala-Cola,’ and ‘Koke,’—that is what I call ‘dope.’ (Rec., 1017). \* \* \* When I was handling ‘Coca-Cola’ alone, I would give that in response to calls for ‘cola’ or a ‘dope.’ \* \* \* ‘Coca-Cola’ is a ‘dope’ like all the rest of the soft drinks. ‘Dope’ applies to all soft drinks,—all ‘*dope*’ stuff. Most invariably when a man calls for ‘dope,’ I ask what *kind* of ‘dope’ he wants.” (Rec., 1018).

W. F. STRICKLAND, bar tender, Chattanooga, Tenn.:

“We handled ‘Koke,’ ‘Maud Muller,’—that is a ‘dope,’—and we used to handle Zimmerman’s stuff,—‘Dope,’ I believe it was; also handled ‘Coca-Cola.’ \* \* \* When customers ask for ‘dope,’ I give them the first thing I get hold of in a soft drink box,—‘Maud Muller,’ ‘Dope,’ or ‘Koke,’ anyone, I give the first one I get hold of, it does not make any difference. \* \* \* If a man asks for a ‘dope’ or ‘coke,’ I give him either one I get hold of. \* \* \* When a customer comes in and asks for a ‘dope,’ I take it for granted that he wants a ‘dope’ and does not care what it is, just so it is something cold. \* \* \* If he says to me give him a ‘dope’ \* \* \* I give him whatever I get hold of first. \* \* \* The ‘Coca-Cola’ bottle has ‘*Coca-Cola Bottling Company*’ on it. I believe it has on the bottom, *Trade-Mark registered*, or something like that,—great big ‘*Coca*,’ and another big ‘*C*,’ and the rest of the letters small. If they ask for the bottle I will show them. Some people want it out of the bottle. They will take it up and look at it, some people do, and want ‘Dope,’ and some people call for ‘Maud Muller,’ and some say give me a ‘Koke.’ ” (Rec., 1048-9).

LUKE POGUE, bar tender, Chattanooga, Tenn.:

"I have dispensed a general line of soda water, red and white, ginger-ale, 'Digestol,' 'Coca-Cola,' 'Rye-Ola,' 'Gay-Ola,' 'Ala-Cola,' 'Nerve-Ola,' 'Koke' and 'Gay-Nol.' Most all '*coke*' drinks have the same color. \* \* \* I have known of these other drinks on the market similar to Coca-Cola about ten years. Customers in asking for the different cola drinks ask for a 'dope,' or a 'shot,' or a 'sniff,' or different things. When they ask for those things I give them most any kind of a '*coke*' drink we have on hand, I mean by '*coke*' drink any that is put up in a black bottle,—'Koke,' 'Gay-Ola,' 'Nerve-Ola,' 'Coca-Cola,'—these cola drinks. I have customers come in and ask for 'coke;' I serve them just whatever we have on hand, if they do not specify. If they call for 'Koke,' whichever way you spell it, we give it to them; if we don't have it we tell them what we have. The same applies to 'dope.' In dispensing these drinks, we just set up a glass and a bottle to them so they can see the bottle. The name 'Coca-Cola' is on the 'Coca-Cola' bottle. Some of the others have names on the bottle and some don't. There is no way for our customers to know, when they come and ask for 'dope,' the drink they are getting with-out it is 'Coca-Cola;' 'Coca-Cola' uses their own bottles and these *other coke companies*, most of them use bottles they pick up,—almost all of them,—and you may get a case with a dozen different names on the bottles. The 'Coca-Cola' bottles have '*Coca-Cola*' on them. \* \* \* When a customer comes into our establishment and asks for a 'coke,' I do not understand that he has made a definite and specific request on me for 'Coca-Cola' and nothing else." (Rec., 1060-61).

J. C. McDONALD, bar tender, Chattanooga, Tenn.:

"I handle soft drinks in my business. I have 'Coca-Cola,' 'Sinalco,' 'Poinsetta.' I did handle 'Coca-Cola,' but not since I have been in business for myself,—that has been six or eight weeks. I have got 'Koke' since I have ben in business here, when in business with other people we had 'Coca-Cola' for a while. We had 'Ala-Cola,' 'Maud Muller,' 'Tru-Cola.' (Rec., 1067-8). \* \* \* I have customers come into our place of business and ask for 'dope.' When they ask for 'dope' I give them anything I have got in the line of a cola drink. I understand when they call for a 'dope,'—no particular brand, unless they call for the particular brand. I never had a customer refuse any of the other cola drinks we have dispensed, other than 'Coca-Cola,' when he asked for it as a 'dope,' on the ground that it was not what he asked for. \* \* \* Customers do not come and ask for a cola drink by any other name besides those I have mentioned,—they say 'coke,' 'dope,' sometimes 'shot,' something like that. I understand they want *anything* in the *cola line*, and I give them what I have got. I do not consider the name 'coke,' or the name 'dope,' is a specific and definite name for 'Coca-Cola,' and no other drink." (Rec., 1068-9).

W. M. POLLOCK, Bottler, Nashville, Tenn.:

"We bottle 'John D. Fletcher's Coke and Cola' flavors. That is the only drink we bottle. The name of our concern is the Nashville Bottling Works. I have bottled other cola drinks. We bottled the 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'Mi-Ola,' 'Star-Cola,' and bottled other drinks, and I have had several samples of different drinks bottled at differ-

ent places. I have heard of, I guess, about 40 or 50,—something like that,—different cola drinks. (Rec., 1198-9). \* \* \* I have heard 'coke' and 'dope,'—well, mighty near ever since I can remember a cola drink. I have heard 'coke' called more than I have 'dope.' These words, as applied to a soft drink,—I think they mean a cola drink. That is what I mean when I call for them. I go into a soda fountain and ask for a 'coke' or a 'dope' mighty near every day; I expect to get a cola drink. I do not expect *any particular* cola drink, because it don't make no difference just so I get a cola drink,— a *caffeine* drink. When I go in and ask for a 'coke' or a 'dope,' I do not consider that I am making *a* definite and specific request upon the soda dispenser for 'Coca-Cola' and nothing else. Just so he gives me a cola drink to quench my thirst is all I care about. I am not particular about what he gives me. The people, in ordering, call for 'cola,' and sometimes they use 'coke.' We have had written orders call it 'C-o-k-e.' \* \* \* I have one at the house, I do not know, the secretary may have some more in his safe; I expect he has. \* \* \* I do *not* regard 'coke' and 'dope' as meaning *any certain one*." (Rec., 1201-2).

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola," Atlanta:

"Engaged in manufacturing syrups and soda water for about 27 years. I am now manufacturing just a general line, ginger ale, root beer, 'Lemo-Lime,' 'Ko-Nut,' 'Afri-Cola.' \* \* \* I have known of cola drinks,—these caffeine drinks,—not counting Coca-Cola, for about 16 years. I got into the 'Afri-Cola' 16 years ago. \* \* \* I have heard the words 'coke' and 'dope.' The first time I heard such

expressions was when I first became connected with the 'Afri-Cola' business. I heard that expression through our traveling man, Mr. Harris. We received an order from a customer of ours in Memphis, I believe it was, to ship a keg of 'dope.' I did not know what it was. I asked Mr. *Ferris* [Harris] about it, and he said that was a name they called the cola drinks in Memphis. \* \* \* I had never heard the word 'dope' applied to soda fountain beverages before that time. There was a concern here in Atlanta once that used to put out a product under the name of 'Dope,'—the name of that concern was 'Dope Company.' I think they labeled their bottles 'Dope,' they advertised their product in Atlanta; I do not remember how extensively. It was a caffeine drink, one of these cola drinks. It was similar in color and taste to 'Coca-Cola.' This concern in Atlanta put out these goods under the name of 'Dope' 12 years ago, to the best of my recollection. (Rec., 1293-4) \* \* \* I knew of the words 'coke' and 'dope' as applying to this class of beverages long before I ever heard of them [defendants' products]. \* \* \* The first time I heard that word 'dope' was in 1899. \* \* \* I *conceive* [concede] that the 'Coca-Cola' was the original 'cola' drink, 'coke' drink, or 'dope' drink, and their advertisements called attention to it." (Rec., 1298).

C. N. BAKER, a bottler for 16 years, at Newnan, Georgia:

"I have bottled 'Cola-Queen,' I called it, and 'Mi-Cola,' and 'Coca-Nola,' 'Rye-Ola,' and I don't know how many,—every drummer that come along I had to take at least a trial package. \* \* \* The names the purchasers who want to buy a bottle of this stuff



use in asking for it,—some will call for a ‘cola,’ some for a ‘dope.’ I have sold many a one for ‘dope.’ I reckon I have sold a fourth of what I put up for ‘dope.’ (Rec., 1407). \* \* \* If you come in and ask for a ‘dope,’ it don’t make any difference what you have, you give it to him,—I do, always did. I never had any one reject what I gave him on the ground it was not what he asked for.” (Rec., 1408).

R. W. LOCHRIE, a bar tender, Birmingham, Ala.:

“I tend bar at the Woodward. \* \* \* I dispense soft drinks there, and cola drinks, also. We are handling at present ‘Nifti-Cola.’ Before we began handling ‘Nifti-Cola,’ we handled ‘Cola-Nip’ and ‘Coca-Cola.’ ‘There is a label on this ‘Nifti-Cola’ bottle. \* \* \* I think it is blown in the bottle, and there is a label on there,—a diamond shaped label, with ‘Nifti-Cola.’ It is a little yellow diamond shaped label on the side of the bottle. \* \* \* Some customers call for ‘a cola,’—what they want,—others call for ‘a dope;’ they come in and say, ‘give me a bottle of dope.’ When they come in and say, ‘give me a bottle of dope,’ I give them what I handle, I give them ‘Nifti-Cola.’ If a man ordered a bottle of ‘dope,’ I would give him anything I had *that come under that head*,—*in that line of drink*. When I was handling ‘Coca-Cola’ and ‘Cola-Nip,’ when a customer came in and asked for a ‘dope,’ I gave him the first one I got hold of, unless he specified a certain one. When a customer comes in and asks for a ‘dope,’ I do not consider that he has made a definite and specific demand on me for ‘Coca-Cola.’ I would take the word ‘dope’ myself to mean a drink that would come under the head of *cola* drinks, soft drinks in *that line*,—‘Coca-Cola,’ ‘Nifti-Cola,’ ‘Cola-

Nip,' 'Chero-Cola,'—anything,—that is my own idea on that. I have known of these cola drinks ten years, maybe longer,—I guess longer than that. \* \* \* I have never had a customer reject any of the cola drinks I have dispensed when he asked for a 'dope' on the ground that it was not what he asked for, but I have when he asked for certain drinks and I told him the difference. I have had them come in and ask for certain drinks and told them that I did not have that drink, but tell them the drink I have and I have had them refuse to take that one. When I set a bottle of 'Nifti-Cola' up on the counter for a customer he ought to be able to tell that it is not 'Coca-Cola.' I could tell *by the label*." (Rec. 1339-1340).

H. O. ADAMS, retail grocery business, Adamsville, Ala.:

"I know J. C. Mayfield. I knowed him in 1903. \* \* \* I was engaged in the retail business at Littleton, Alabama, selling groceries, fruits, meats and drinks. I bought some of Mr. Mayfield's products. I bought 'Celery-Cola' and the drink—the 'Koke.' \* \* \* That was bottled goods I got. (Rec., 1343). \* \* \* I am still in business. I have handled different products, something like those, 'Wise-Ola' and drinks made out here by the Pioneer Bottling Works, the same kind of stuff. They don't make nothing but 'Coca-Lulu.' \* \* \* That was when I was at Littleton, I sold that stuff. \* \* \* We used to handle 'Rye-Ola,' 'Wise-Ola,' and some other kinds of drinks, and after that I went into the bottling business, in 1907, to bottling. I was bottling up to the first of January. I shut down. There was no money in it then. We bottled what you call

'Queen-Ola' and 'Wise-Ola.' \* \* \* 'Dope' applies to all these kinds of drinks." (Rec., 1344-5).

H. L. FISHER, wholesale liquor business, Birmingham, Ala. :

"My business takes me around the bars. \* \* \* I frequently hear the names people use in asking for drinks around the bar. \* \* \* The bars handle all these drinks sold here in the market,—'Rye-Ola,' 'Coca-Cola,' 'Ala-Cola,' and this 'Dope,' and I do not know, there seem to be eight or ten of them. I have known of these cola drinks, it seems to me like, always, but,—oh, well, I can't remember when there wasn't any. \* \* \* I have heard people ask for a 'dope' and be served with 'Rye-Ola,' or these other drinks. I never heard anybody refuse those drinks as not what he asked for when he asked for it as 'dope.' These 'cola' drinks are all labeled,—most of them have the name on the cap. \* \* \* I sometimes go in and ask for those drinks myself. I go in and say, 'give me a bottle of 'dope,' and I get anything that he gives me,—I am not expecting any certain thing. \* \* \* From my experience, my hearing people ask for these different drinks, and what appears from observing the custom of the bars here in Birmingham, I do not consider that when a customer comes in and asks for a 'dope' that he has made a definite and specific request for 'Coca-Cola,' because there is so many of these drinks that a man will go in and ask for a 'dope' and take any one of them that is handed to him." (Rec., 1345-6-7).

G. G. DESOUCHE'T, bar tender, Metropolitan Hotel Bar, Birmingham, Ala. :

"We handle soda pop and something we call 'dope.' I lived in Louisville about nineteen or twenty years. \* \* \* I have never handled, in the various places I have worded, any other cola drink but 'Coca-Cola,' and, in Louisville, 'Chero-Cola' and 'Coca.' Well, there has been a number of 'Colas,' with a little difference in the latter part of the name,—instead of making it 'Coca-Cola,' they make it 'Coca-*something*,' you know. I have known that 'Coca-Cola,' of course, first, a number of years ago,—I do not know just how long,—and then these other drinks came out later, and for a number of years I have handled a number of cola drinks. Customers in indicating to me the different cola drinks they want, some of them call for a 'dope' and some of them call for a 'Coca-Cola,' or soda pop,—but, of course, that is nothing like the *cola* drinks. When they come in and ask for a 'dope,' I give them 'Dope.' Before I commenced to handle 'Dope,' when they asked for 'dope' I gave them anything indiscriminately,—any of the other drinks I had there. I give them anything. In our business we consider them all 'dope,'—the whole business. (Rec., 1348-9). \* \* \* When a man comes in and asks me for a 'dope,' I give him 'Dope,' and if he asks me for 'Coca-Cola' I tell him I have not got 'Coca-Cola,' but I can give him some 'Dope.' Sometimes he says he don't want it, and sometimes he says, 'all right, give me that.' Customers ask for 'dope,' using the word 'dope.' I never have had them reject what I gave them on the ground that it was not what they asked for. At Louisville customers frequently came in and asked for 'dope.' I gave them something besides 'Coca-Cola,'—some of the other cola drinks. I done that for the reason of the price, that is all,—not on account of the goods,—that is 'Coca-Cola' costs 70

cents up there, and the other cost 50. If they came in and asked for a 'dope,' and I gave them some of the other drinks, I considered that I was giving them what they asked for." (Rec., 1350).

(S. M. TUCKER, bar tender, Birmingham, Ala.:

"We have the 'Dope,' 'Cola-Nip,' 'Nifti-Cola,' soda waters,—but the cola drinks, that would be just the 'Cola-Nip' and 'Nifti-Cola.' \* \* \* We use another soft drink, named in the Birmingham business just 'Dope.' Customers indicate these cola drinks by asking for a 'dope,' and I give them a 'dope.' Sometimes they will ask for a 'cola' or a 'Coca-Cola,' and I tell them I have not got 'Coca-Cola,' but I will give you a 'Cold-Nip' or give a 'Nifti-Cola,' and they say, 'all right.' I always tell them we have not got 'Coca-Cola.' They will say give me a 'Nifti-Cola' or a 'Dope' or a 'Cola-Nip.' When customers come in and ask for a 'dope,' I do not consider they are making a definite and specific request on me for 'Coca-Cola.' Some people will not drink 'Coca-Cola.' " (Rec., 1353).

OMER REED, bar tender at Morris Hotel Bar, Birmingham, Ala.:

"We handle one cola drink made here in Birmingham, that 'Co?Co,' spelled 'Co?Co.' We have been handling that since I have been here. Sam Worcester makes that. 'Dope' is the only name we have for it. They come in and ask for 'dope.' When they ask for 'dope' I give them that 'Co?Co.' I never had any customers reject that 'Co?Co' when asked for 'dope' on the ground that it was not what they asked for. There is nothing on the bottle to indicate what is in there, only on the crown,— 'Co?Co' on the crown. When our customers come in

and ask me for a 'dope' I do not consider that they are making a definite and specific demand on me for 'Coca-Cola.' The word 'dope' means to me, as applied to a soft drink, any of those cola beverages, in my opinion. When a man calls for 'Coca-Cola,' I would give him 'Coca-Cola' if I had it; I would not give him 'dope.' We have people come in and ask for a 'Coca-Cola.' I tell them I have not got it. They will say, 'give me a "dope."' (Rec., 1355).

E. D. MONTGOMERY, manager of the Eastern Division of the Southern Bell Telephone Co., Birmingham:

"I go into soda fountains now and ask for drinks of that kind. I sometimes use a word 'dope' in asking for these drinks. When I ask for a 'dope' I don't know what I expect to get. I get anything *in that line* of beverage, —'Chero-Cola,' 'Coca-Cola,' 'Koke,'—most any other drink that is put up in that beverage, because they handle so many different grades. \* \* \* I do not consider, when I go in and ask for a 'dope,' that I am making a definite and specific demand for 'Coca-Cola.' (Rec., 1358). \* \* \* I happened to be in one of the bars and asked for a 'Coca-Cola,' and they said, 'I have not got it, I can give you a 'dope.' I do not know how long ago that was, —approximately, say, two years." (Rec., 1361).

EDWARD J. OPLE, an employee of the Southern Bell Telephone Co., Birmingham:

"Cola drinks on the market are: 'Chero-Cola,' 'Coca-Cola,' and several different bottled drinks,—I am not familiar with the adopted name. I go into soda fountains and drink those drinks. I usually walk into a soda fountain, or saloon, and ask for a 'dope.' When I ask



for a 'dope' I expect to get most any of them. I mean by a 'dope,' several different bottled drinks, not a specific drink,—what the substance of it is I can not say. When I go into a soda fountain and ask for a 'dope,' I do not consider that I am asking the dispenser specifically and definitely to serve me with 'Coca-Cola.' \* \* \* If I were served with 'Rye-Ola,' or 'Ala-Cola,' or anything of that sort, I would consider that I was getting what I asked for." (Rec., 1404-5).

WILLIAM DALTON, manager of the Health and Accident Insurance Co., New Orleans:

"I believe my personal information is that all that stuff goes under a common name of 'dope' or 'coke,'—all those drinks." (Rec., 1559-60).

## 2

### **Admissions of Plaintiff's Witnesses.**

**(a).—Those who admit that "Coke," "Dope," etc., mean any cola drink.**

T. J. HAZLIP, a retail druggist, Ft. Worth, Texas:

"You asked why I suppose people would apply the name 'dope' to one dope and not apply it to all the other dopes; well, I have an idea they apply it to all the other dopes. Yes, they put them all in the same class, if they know there is another dope. I know people who would come in and say—if they asked somebody to take a drink—'Do you drink Coca-Cola, or do you drink Koke?' Well, it's all dope, anyway—what's the difference? So go ahead, I will drink with you.'" (Rec., 1964).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

"Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola.' I know that there is. Yes sir, I class those drinks as dope, most of them. \* \* \* I don't know that I would class all of them, because I don't know about them, but the ones I do know about I would class as dope, yes sir." (Rec., 1980).

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn.:

"I do not know that I can give you the correct definition of the word 'dope' but I take it as meaning something like opium or morphine, something of that kind—that would be my idea about it. \* \* \* Q. What does the word coke ordinarily mean to you? \* \* \* A. Well, it carries with it very much the same meaning that I gave you for dope, to me, to my mind. \* \* \* If it has any meaning it is more like a 'coke-fiend,' or a 'dope-fiend' or something like that. Oh, yes, I have heard of a 'coke-fiend.' Oh, yes, sir, I have heard of a person taking morphine or cocaine—anything like that—and referring to them as 'coke-fiends,' oh, yes, sir. Yes, I have understood that these cola drinks had some kind of drug in it of that kind, some kind of narcotic. Yes, sir, I have heard it said that they had cocaine in them." Rec., 2017-18).

S. B. CHRISTY, a "Coca-Cola" bottler, Murfreesboro, Tenn.:

"Yes, sr, I have heard of a person who used cocaine;

I have heard them referred to as a 'dope-fiend,' and I have also heard them called cocaine fiends. (Rec., 2301). \* \* \* Yes, sir, we called our drink [made from 'Nerve-Ola' syrup] 'coke' in 1902. All of us at the factory called it coke, and the men that worked at the factory, and the people in general,—our customers. 'The fact of the business is they call all of these drinks 'coke' at times. 'These cola drinks are generally known as 'cokes' and 'dopes.' " (Rec., 2304).

JOHN H. BOHNE, a "Coca-Cola" jobber, St. Louis, Mo., and former manufacturer of "Orin-Cola":

"We created a demand for our drink under the name of 'Orin-Cola.' I place that beverage in the class which I designate as cola drinks. It was known as 'dope' also." (Rec., 2046).

CLAUD W. HICKEL, formerly a dispenser of a number of dope drinks at Ocala, Florida, now of Charleston, W. Va.:

"A majority of the customers of the Anti-Monopoly Drug Store could tell the difference between the drinks that we were selling and 'Coca-Cola.' \* \* \* 'The reason why I know that a majority of them could tell the difference between the drinks we sold and 'Coca-Cola' is because they would tell me so. We had some customers that came there every day or two to our place and they usually came to our fountain. 'The majority of our customers,—what I mean, regular customers,—don't ask for 'Coca-Cola'; they asked sometimes for 'dope' and sometimes 'coke,' but they knew they were not getting 'Coca-Cola.' Rec., 2066-7). \* \* \* We called them 'dope,' 'coke'—whatever the customer asked for. Q.

What names did you use to classify those drinks? A. We generally called them 'dope.' " (Rec., 2065).

GEORGE L. SEIBERT, a soda dispenser, Mobile, Alabama:

"Any one taking cocaine, you call that 'dope,' and it means a drug on the order of cocaine, that's the only way I have heard of it, and a drink something *on the order of* 'Coca-Cola.' \* \* \* You ask if there is any other drink I know of called 'dope'; well, only *on the order of* 'Coca-Cola.' Yes, sir, *any drink on the order of* 'Coca-Cola' is called 'coke' and dope." (Rec., 553).

JOHN W. GRAHAM, a soda dispenser, Mobile, Ala.:

"When I got experience, a man came in, asked for 'coke,' nine times out of ten he wants 'Coca-Cola.' "

What does he want the tenth time?

O. P. BLAND, a confectioner, New Orleans, La.:

"Now, I want to tell you, if I handled 'Koke' or any thing they call 'dope,' and I handled 'Coca-Cola'—I handled all three—and a man came in and ask for 'koke' I would give him 'Koke,' if he asked for 'dope' I would give him 'Dope,' if he asked for 'Coca-Cola' I would give him 'Coca-Cola,' but I handle only the one, and consequently I give him only that." (Rec., 670).

O. M. BROWN, a drug clerk, Oriental Drug Store, Dallas, Texas:

"About three weeks ago at the request of the 'Coca-

Cola' representative, Mr. Peace, I put on a test at the Oriental Drug Store, of our customers coming in. Q. Well, now what proportion of these people that called for 'coke' during the time that test continued, wanted 'Coca-Cola'—that called for 'coke'? A. Well, *half of them any way.*" (Rec., 764).

What did the *other half* want?

**(b).—All the rest of plaintiff's witnesses admit they do not know, and are in no position to know, whether or not the slang expressions, "coke," "dope," etc., are used to indicate the maker of the article, or merely to describe its characteristics.**

DAVE S. BAUER, a retail druggist, Mobile, Ala.:

"No, sir; you did not understand me to say that I carried no other soft drink but 'Coca-Cola'; I said no other *cola* drinks. Rec., 538). \* \* \* No, sir; I don't know the names the public use in calling for these numerous cola beverages. (Rec., 542). \* \* \* No, sir; I don't know the names by which the public asks for these drinks of that class. I don't know whether they ask for those drinks by the name of 'dope' and 'coke,' or not. No, sir; I don't know whether 'coke' and 'dope' are also nicknames for those drinks. (Rec., 543)."

G. H. UPCHURCH, a retail druggist, Mobile, Ala. (Rec., 525):

"No, sir; I have never handled any other beverages similar to 'Coca-Cola.' I have never handled

any other cola beverages except 'Coca-Cola.' No, sir; I have never seen any other cola beverages bought or sold. \* \* \* No, sir; I don't know what names the public use in asking for these beverages. \* \* \* I don't know whether the public calls for these beverages under the names of 'coke' or 'dope.' "

'E. R. ALBRIGHT', a retail druggist, Mobile, Ala. (Rec., 550):

"No, sir; we don't handle any other drink now except 'Coca-Cola,' and so, of course, I don't know what the users of other drinks call their particular drink."

GEORGE L. SEIBERT, a soda dispenser, Mobile, Ala. (Rec., 554):

"No, sir; we don't handle any other cola drinks at our fountain except 'Coca-Cola.' I have never heard anybody ask for any other cola drinks than Coca-Cola."

ROBERT W. ELLIOTT, a soda dispenser, Mobile, Ala. (Rec., 565):

"Of course, we don't handle any other cola drinks. Yes, sir; I am entirely a 'Coca-Cola' man, and so is my establishment,—that is, we sell nothing on that order except 'Coca-Cola.' \* \* \* Of course, I don't know what other people call their particular dope, or their particular drink, rather; I don't know whether they call for these drinks as 'coke' and 'dope,' or not; nor do I know whether or not 'dope' and 'cope'



are common names for cola beverages as a class.”  
(Rec., 566).

I. D. WOOD, a retail druggist, Mobile, Ala. (Rec., 570-3):

“No, I have not handled any other cola drinks in my place,—nothing but the ‘Coca-Cola,’ and a stuff called ‘Dope’ and ‘Koke.’ No, sir; I don’t know what other people call their particular drinks. \* \* \* No, sir; I don’t know what people would say when they call for them. \* \* \* No, sir; I have never heard of any cola drinks on the market but the ‘Dope’ and ‘Koke’ products. I don’t know what names the trade calls for in the retail drug stores. I don’t know whether or not they call for these other cola drinks under the names of ‘dope’ and ‘coke.’ \* \* \* I have been in the ‘Coca-Cola’ business all my life, and have handled nothing but ‘Coca-Cola’ except this product previously mentioned, and only a gallon of that. Of course, I don’t pretend to know the names the trade uses in calling for the other drinks of a similar character.”

J. M. PENLAND, a wholesale druggist, Waco, Tex. (Rec., 1981-2):

“I don’t know the nicknames by which the public asks for other cola drinks. I don’t know whether they ask for those drinks by ‘dope,’ ‘shot in the arm,’ and these other names, or not. I have been a regular dealer in handling ‘Coca-Cola’ all the time, and, of course, not having handled or dealt in the other cola drinks, I haven’t paid any attention to the other people handling the other trade in the other drinks. I haven’t had an opportunity to observe

them. Not having dealt in any other drink similar to 'Coca-Cola,' I am, of course, not familiar with the customs and habits of the trade, and customers, and the names they use in asking for those different drinks in soda fountains. I am not familiar with the preparations to any extent."

T. J. HAZLIP, a retail druggist, Fort Worth, Tex.  
(Rec., 1966):

"Well now, I don't know what nicknames the public commonly applies to other cola beverages at fountains where they are served, or what beverages they want when they ask for 'coke' and 'dope' at other fountains."

GEORGE S. MORSE, a retail druggist, New Orleans, La. (Rec., 647):

"No, sir; I have handled none of the other sort of drinks. \* \* \* Of course, I don't know what the other soft drinks are, or what names the habitués call for them under."

CECIL V. RODGERS, a retail druggist, Dallas, Tex.  
(Rec., 737-8):

"I have never seen any other similar drink to 'Coca-Cola.' \* \* \* Yes, sir; my establishment is well known as keeping 'Coca-Cola.' It has always enjoyed that reputation, and my customers are 'Coca-Cola' customers. I have had them very often to make the remark that they would walk two or three blocks out of the way because they knew they were going to get genuine 'Coca-Cola.' Of course,

I cater t them, t keep regular habitues of 'Coca-Cola,'—try to keep a regular trade as regular habitues of 'Coca-Cola.' "

JACOB SCHRODT, a retail druggist, Dallas, Tex.  
(Rec., 742-4):

"Yes, sir; I mean by that I have handled no other similar drink,—nothing similar to 'Coca-Cola,'—and never have. My custom is built up as a 'Coca-Cola' custom in that particular line, and, of course, I try to keep it, and they so understand that I am catering to the 'Coca-Cola' taste and custom. \* \* \* I know that drinks are served that are similar to 'Coca-Cola' at other fountains,— \* \* \* I have drunk some of them,—I have no experience of my own knowledge to know what the run of the customers call for. We don't buy anything that looks like 'Coca-Cola' but 'Coca-Cola.' "

CHARLES R. SMITH, a retail druggist, Dallas, Texas (Rec., 747):

"Yes, sir; my store is recognized as a 'Coca-Cola' store; I mean by that, that I handle 'Coca-Cola' to the exclusion of other similar drinks."

J. W. ARRANT, a retail druggist, Dallas, Texas.  
(Rec., 749):

"We have the reputation of being the largest dispenser of 'Coca-Cola' in Dallas, and we handle large quantities of it. We make that our specialty, and since we cater to it, we want that custom and we certainly do keep it. \* \* \* Our customers, of course,

are 'Coca-Cola' customers; they come there because they know they can get 'Coca-Cola' there. \* \* \* Everybody in Dallas knows they can't get anything but 'Coca-Cola' from me. No soft drinks similar to that are carried. \* \* \* No cola drinks."

A. M. TIMMS, a retail druggist, Dallas, Texas (Rec., 754):

"I don't handle anything else except 'Coca-Cola.' I don't handle anything else of that class,—any rival drink, cola drink."

JAMES ROGERS, a retail druggist, Dallas, Texas. (Rec., 755-6):

"Yes, sir; I know from the financial side that I have a very large 'Coca-Cola' business. In our fountain we specialize on that to a certain extent. \* \* \* No, sir; we haven't carried any other rival cola drinks,—those that claim to be in the same field as 'Coca-Cola'; we don't handle anything else."

S. Y. ALTHOFF, a soda dispenser, Dallas, Texas. (Rec., 763):

"We are not selling any drink of the same nature at the Owl Drug Company. We handle 'Coca-Cola' exclusively. \* \* \* Yes, sir; our customers are 'Coca-Cola' customers. They come to us because they know we sell it. It is our boast, our brag that we dispense pure 'Coca-Cola,' and nothing but pure 'Coca-Cola.'"

O. M. BROWN, soda dispenser, Dallas, Texas (Rec., 764):

"No, sir; we don't handle any other rival drink of 'Coca-Cola,'—that is, any drink of the same general kind."

E. B. THOMAS, a retail druggist, (Rec., 771):

"No, sir; I carry no other drinks of the kind of 'Coca-Cola,' other than 'Coca-Cola.'"

C. D. KINGSTON, a retail druggist, (Rec., 792):

"I have handled 'Coca-Cola' altogether,—nothing but Coca-Cola."

F. L. SKILLER, a retail druggist, Dallas, Texas. (Rec., 795):

"I handle 'Coca-Cola' strictly, and don't handle anything else."

J. F. REDDING, a retail druggist, Atlanta, Ga. (Rec., 479):

"No, sir; I have never handled any other beverages similar to 'Coca-Cola' other than 'Coca-Cola.' \* \* \* Why, no, sir; I don't know as I do know of any similar beverage to 'Coca-Cola' that is being sold in Atlanta. \* \* \* I could not say they are on the market because I don't handle them. Probably they are, but I don't know that."

W. A. MEDLOCK, a retail druggist, Atlanta, Ga. (Rec., 483-4):

"I am a regular customer of the Coca-Cola Company. \* \* \* You ask if I have ever seen any kegs

or barrels in which the other cola beverages on the market are shipped; we don't handle any other kind."

LINTON STEPHENS, a retail druggist, Atlanta Ga.  
(Rec., 486):

"No, sir; I have never handled anything else but 'Coca-Cola' at my fountain. \* \* \* I never did handle anything but 'Coca-Cola' at the fountains where I worked."

T. C. MARSHALL, a retail druggist, Atlanta, Ga.  
(Rec., 495):

"Yes, sir; I have heard of other beverages similar to 'Coca-Cola' asked for at soda fountains,—but we never did sell them at all."

j B. PENDTRGAST, a retail druggist, Atlanta, Ga.  
(Rec., 497):

"We have no other similar beverage in our fountain but 'Coca-Cola.' No, sir; we haven't any other so-called cola or caffen containing beverage in our fountain."

E. EWER, a retail druggist, Dallas, Texas. (Rec., 808):

"No, I carry no other drink of that kind but 'Coca-Cola,' at my fountain."

W. H. RAMSEY, a retail druggist, Dallas, Texas.  
(Rec., 820):



"No, sir; I don't serve any other drinks of that kind but 'Coca-Cola.' "

J. B. SMITH, a retail druggist, Dallas, Texas. (Rec., 825):

"We have never sold nothing but 'Coca-Cola.' "

T. J. BRITTON, a retail druggist, Dallas, Texas. 831):

"I have sold nothing but 'Coca-Cola' all my life."

EDWARD T. LANGAN, a lunch room proprietor, but formerly a soda dispenser, Chicago. (Rec., 894):

"For the last twelve years I should say I have sold 'Coca-Cola.' \* \* \* I haven't dispensed any of this great number of cola drinks that are on the market." (Rec., 897).

F. M. GREEN, a retail druggist, Atlanta, Ga. (Rec., 454):

"No, sir; I have never handled any other drink at my soda fountain that tasted anything like 'Coca-Cola.' I have been a customer of the Coca-Cola Company of Atlanta, Ga., ever since I began to handle that stuff."

I. L. JAMES, a retail druggist, Atlanta, Ga. (Rec., 461):

"No, sir; I have never handled any other cola or caffein containing beverage except 'Coca-Cola.' "

ALEXANDER CRUICKSHANK, proprietor of a cigar store and soda fountain, Atlanta, Ga. Rec., 463):

"Yes, sir; we dispense 'Coca-Cola.' \* \* \* The other drinks we serve at our fountain are lemon and lime, vanilla soda, orange-ade, chocolate, root beer, &c."

J. D. T. LAWRENCE, a retail druggist, Atlanta, Ga. (Rec., 471):

"I never had anything else that was made for 'Coca-Cola.'"

DAVID G. WISE, a retail druggist, Atlanta, Ga. (Rec., 476):

"No, I never handled any drink simiar to 'Coca-Cola' since I have been in business,—none of the so-called cola beverages or caffen containing beverages. Oh, yes, I have been quite a good steady customer of the Coca-Cola Company all the time, very much so,—we get a very nice *rebate* at the end of the year."

JOHN NEHOS, proprietor of a soda fountain, Atlanta, Ga. (Rec., 512):

"Oh, no, I have never had any other drink of a tate and color similar to 'Coca-Cola.'"

## SCHEDULE XIII.

### **Defendants' Goods Have Not Been Passed Off As Plaintiff's Goods.**

In Plaintiff's Schedule 6 under the caption "The product of the Koke Company has been systematically and habitually sold to the public as Coca-Cola," plaintiff cites only two witnesses whose testimony tends in the slightest degree to support the pretentious claim thus made, namely, D. P. English and B. W. Fuller, the former now an exclusive dealer in "Coca-Cola," and the latter now a soda dispenser in an exclusive "Coca-Cola" establishment.

There is no pretense that defendants had any sort of knowledge of the alleged circumstances these two parties relate, or that defendants are in any manner responsible for what they say occurred. •If their statements could be accepted as true and taken at their full face value, what they say would not sustain the extravagant claim that defendants' goods have been "'systematically and habitually sold to the public as 'Coca-Cola,'"—at best it would only go to show that in two isolated cases, wholly unknown to the defendants, a dishonest drug clerk in instance, and a dishonest soda jerker in another, served patrons of the fountains where they were employed with defendants' goods when "Coca-Cola" was asked for, and that in one case this practice continued only about a month before it was stopped by the management, while in the other it continued about two and a half months, when it was entirely discontinued. Of course, defendants could not be held responsible for that a dishonest drug clerk or soda jerker, or even a dishonest retail dealer, might do without their knowledge, consent of acquiescence, and without aid, suggestion or inducement

from them. *Coca-Cola Co. vs. Branham, et al*, 216 Fed., 264; *Mumm vs. Kirk*, 40 Fed., 589.

But as a matter of fact, the stories these two youngsters tell are of exceeding doubtful occurrence.

English says he was employed at the Palace Drug Company, Dallas, Texas, from May 1st to December 1st, 1913. (Rec., 803); that J. G. Pyle was manager only until July 15th, 1913, when Messrs. Florence & Nossick took over the business, and thereafter carried "Coca-Cola" exclusively. (Rec., 802). He says that during the two and a half months that Pyle was manager, from May 1st to July 15th, 1913, when people came into the store and asked for "Coca-Cola," the soda dispensers would serve them "Koke." (Rec. 802). He says that during that time the Palace Drug Company 'handled Koke, and I *think* they handled it exclusively. I don't *think* they handled any 'Coca-Cola.' I never heard of them buying any while I was there." (Rec., 802). He admits, however, that he was only the prescription clerk, (Rec., 803), and that, "of course, I did not buy the soda fountain syrups which they served, myself. I don't remember that I ever ordered any." (Rec., 807). He admits that he did not even bring up the syrups from the basement and put them in the fountain, but that the negro porter always did that, (Rec., 804), and that as a matter of fact "Koke" and "Coca-Cola" were so nearly alike that he could not tell, from looking at or tasting the syrup, whether it was "Koke" or "Coca-Cola" that was actually in the fountain. (Rec., 804). He admits that "the part of the store which I occupied was the prescription department," and that "the prescription department is in the rear of the store, and, as a rule, I am not visible while making prescriptions,—

I made them behind the counter. I had nothing to do with the soda fountain at all." (Rec., 803).

On the other hand, J. G. Pyle, the manager of the store, says, "I carried both 'Coca-Cola' and 'Koke,'" (Rec. 1722), and shows that during the two and a half months that he was manager in 1913, he purchased 600 gallons of "Coca-Cola." (Rec., 1723). He says that "Koke" was kept in one compartment in the fountain, and "Coca-Cola" in another, (Rec., 1722); that "Koke" was kept in the "simple syrup" jar, while "Coca-Cola" was kept in a jar labeled "Coca-Cola," (Rec. 1729); that he always kept two regular soda dispensers, (Rec., 1721), who had specific instructions to always serve "Coca-Cola" when it was asked for (Rec., 1722); and that "Koke" was never sold when "Coca-Cola" was asked for, to his knowledge. (Rec., 1723).

It is plain, therefore, that when English said it was "Koke" that was served on calls for "Coca-Cola," he was not stating a fact within his own knowledge, but an inference he had drawn from the erroneous assumption that the store had nothing but "Koke" in the fountain. He knew the dispensers were serving *something* when "Coca-Cola" was called for, and, being under the mistaken impression that they had *no* "Coca-Cola" to serve, jumped at the conclusion that they must be serving "Koke"; but, as the store did carry "Coca-Cola" as well as "Koke," and carried it for the express purpose of supplying the demand for "Coca-Cola," and as the dispensers were strictly enjoined to always serve "Coca-Cola" when it was asked for, it is highly probable that what they actually served to those who demanded "Coca-Cola" was, in fact, "Coca-Cola," and that English's assumption that it was "Koke" was due entirely to the un-

warranted inference drawn from the false premise that "he did not *think*" they had any "Coca-Cola."

On cross-examination English went a step further and said that he himself had served drinks at the fountain, and that he personally had sold "Koke" for "Coca-Cola." Thus:

"I mean to say that I sold 'Koke' for 'Coca-Cola.' \* \* \* In the morning before the others got down I served a good many drinks. (Rec., 803). \* \* \* You ask how often I served behind the counter,—I would open the store every other morning, and I would be there usually about twenty minutes before any of the other clerks got down, and people would call in and ask for 'Coca-Cola' and I would serve them." (Rec., 804).

But, as he was under the mistaken impression that there was no "Coca-Cola" in the fountain, and that it was all just "Koke," it is obvious that he might have been, and probably was, actually serving "Coca-Cola" without knowing it. He admits that he invariably drew the syrup for the drinks he served from the jar labeled "Coca-Cola," (Rec., 804) which was the jar containing the "Coca-Cola." (Rec., 1729).

He admits that the manager, J. G. Pyle, did not open the store in the morning (Rec., 804), and that "I couldn't say that I reported to my bosses that I was serving 'Koke' as 'Coca-Cola.' (Rec., 805) \* \* \* I never did go to Mr. Pyle and tell him about anything like that." (Rec., 806). He adds, however, that "there wasn't any occasion for me telling him I was palming it off, because he knew it,—he was buying it and knew what went in." (Rec., 805-6). But this was just another inference based upon the erroneous supposition that Pyle hadn't



bought any "Coca-Cola," and, consequently, must have known it was "Koke" and not "Coca-Cola" that was being served when "Coca-Cola" was asked for. As Pyle had bought "Coca-Cola," and 600 gallons of it at that, it is clear that English's inference was not justified.

Finally, English says that he personally served drinks from the fountain, not only early in the mornings before the other clerks got down, but at various times throughout the day, and that Pyle saw him serving drinks there day after day, and repeatedly saw him serving "Koke" for "Coca-Cola." (Rec., 806). He says:

"I never made any record of the times he has seen me behind there, but it has been a good many times." There were only "a very few days at a time when he did not see me behind the counter at some time during the day serving drinks. I have no doubt he saw me serving 'Koke' for 'Coca-Cola.' You ask if I am sure he did; yes, he saw me." (Rec., 806).

If it were true that English really did serve drinks at the fountain, and that Pyle saw him doing so, and saw him serving *something* to people who asked for "Coca-Cola," that wouldn't be any indication that Pyle had the slightest idea but what English was serving "Coca-Cola" on all such calls. Both "Koke" and "Coca-Cola" were in the fountain; the dispensers had very positive orders to always serve "Coca-Cola" when it was asked for; and Pyle would naturally have assumed that his orders were being obeyed. If he had observed the jar from which English invariably drew the syrup, he would have seen that it was the "Coca-Cola" jar, and would have known that what he was serving was indeed "Coca-Cola." English's statement that Pyle "saw him

serving 'Koke' for 'Coca-Cola,' " is nothing more than an unfounded assumption. English "thought" there wasn't any "Coca-Cola" in the fountain; he "thought" the jar labeled "Coca-Cola" contained only "Koke" (Rec., 804); and, consequently, he "thought" that what he was serving was "Koke," and that Pyle, who purchased all the soda fountain syrups, must have known it; when, as a matter of fact, "Coca-Cola" and "Koke" were both in the fountain, in separate containers,—the "Koke" in the "Simple Syrup" jar and the "Coca-Cola" in the jar labeled "Coca-Cola" from which English drew the syrup for the drinks he made,—and, whether he knew it or not, what English was serving all the time was "Coca-Cola."

But the truth is, as English at first swore, that he was only the prescription clerk, that he occupied the prescription department at the rear of the store where he could not see what was going on at the fountain, and that he did not serve any drinks at the fountain and had nothing to do with the fountain department at all. (Rec., 803).

J. G. PYLE:

"We did business in Dallas, Texas, under the name of the Palace Drug Co. At that time we had in our employ D. P. English \* \* \* He is a prescription man. I never saw him dispense any,—if he did it was while I was out. He never did any of it. I always kept a couple of soda men, and, if he ever dispensed any, I did not know it. (Rec., 1720-1) \* \* \* I do not suppose he ever drew a drink, unless he did it for himself,—sometimes those fellows will draw their own drinks,—but I never did know him to sell a drink of any kind.

\* \* \* It was not his business to do it. (Rec., 1722-3). \* \* \* I gave the dispensers instructions with reference to the sale of 'Koke' and 'Coca-Cola.' I had *several* ]*separate*[ compartments to keep it in, and I told them if they called for 'Coca-Cola' to give 'Coca-Cola,' and if they called for 'Koke' to give them 'Koke.' I never told any of our dispensers to substitute 'Koke' when 'Coca-Cola' was asked for. I never told D. P. English to substitute 'Koke' when 'Coca-Cola' was asked for. I never thought he had anything to do with the 'Coca-Cola' business. \* \* \* None of our dispensers, or D. P. English, or any one else connected with our establishment during the time we were handling 'Koke,' ever sold 'Koke' when 'Coca-Cola' was asked for, to my knowledge. I never heard that they had done so. I always instructed them not to do it. If they did it, it was against my instructions. (Rec., 1723). \* \* \* Of course, I could not stand there and watch them and see what they were serving. I took it they would do what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. (Rec., 1728). \* \* \* It would not be difficult for a soda man to know what he was serving. (Rec., 1727-8). \* \* \* 'They could mistake one for the other, if they had been side by side and no labels on them,—they could have gotten them mixed up,—but we were very careful not to get one in the other; there was no reason to do so.' (Rec., 1728).

The alleged substitution of "Koke" for "Coca-Cola" was evidently an after-though with English. He said that, when he was called on by plaintiff's representative for the purpose of securing him as a witness, "I

did not tell him this story about *substituting* 'Koke' for 'Coca-Cola.' \* \* \* I did, however, tell them that I was *serving* 'Koke' *instead* of Coca-Cola.'" (Rec., 806-7).

The other witness plaintiff has produced to prove that defendants' goods are "systematically and habitually sold to the public as 'Coca-Cola,' is B. W. Fuller, who says: (Rec., 833-4).

"The Kirby Drug Co. at one time dispensed 'Koke' over its counter. They carried it exclusively the last month or so while I was there. \* \* \* You ask if they sold it as 'Koke' or as 'Coca-Cola'; they sold it as both. If a man came in and called for 'Coca-Cola,' they served him 'Koke,—they didn't have anything else to serve him, sometimes they told him what they were serving,—told him it was 'Koke' and sometimes they didn't,—supposed to tell him along towards the last, they were supposed to tell him it was 'Koke.' You say you are not trying to find out what they were supposed to do, but whether 'Koke' was sold by the Kirby Drug Co. as 'Koke' or as 'Coca-Cola'; as both,—first it was sold as 'Coca-Cola,' as long as it lasted, and then they sold it as 'Koke' *as long as it lasted*, and then they sold it as 'Koke.' It must have been about a month, I guess, that they sold it as 'Coca-Cola.' (Rec., 834). \* \* \* You ask if my boss did not tell me to tell customers that we were serving 'Koke'; that's along towards the last part, he told me to tell them I was selling 'Koke.' (Rec., 835). \* \* \* Towards the last I sold it as 'Koke' to them, I did not pretend it was 'Coca-Cola.' When I left the company, my last service there, I was serving 'Koke' pure and simple to my customers, and they knew it." (Rec., 836).

The witness is evidently confused. It seems that up to the last month or so the Kirby Drug Co. carried both "Coca-Cola" and "Koke," and, when he says, "first it was sold as 'Coca-Cola,' *as long as it lasted*, and then they sold it as 'Koke,'" what he evidently had in mind was that they sold what "Coca-Cola" they had left on hand as "Coca-Cola" as long as it lasted, and then, when it ran out, and they had nothing left but 'Koke,' they then told their customers that what they were serving was "Koke."

It is highly significant that Fuller, who was formerly one of the soda dispensers at the Palace Drug Co. (Rec., 833), was not even asked by plaintiff if "Koke" was ever substituted for "Coca-Cola" at that store. Evidently plaintiff preferred to prove the fact by a prescription clerk who admitted he had nothing whatever to do with the soda fountain department.

On pages 142 to 157 of plaintiff's schedules, plaintiff quotes some extracts from the cross-examination of twelve of defendants' witnesses, stating in the caption that these extracts "clearly show the deliberate, systematic passing off of the Koke Companies' product for 'Coca-Cola.'" This must be intended for a joke, because certainly none of these witnesses says he sells defendants' goods for plaintiff's. On the contrary, they all distinctly state that they always serve plaintiff's product when asked for "Coca-Cola," and that it is only when their customers ask for "coke," "dope," "shot-in-the-arm," or some such expression that indicates merely the *kind* of drink desired without giving any information as to what, if any, brand is preferred, that they ever serve defendants' product. These witnesses do state, of course, defendants' product costs them less than plaintiff's, that they are in business to make money, and

that they naturally like to handle defendants' good because they can make a larger margin of profit on them, and that, therefore, they prefer to sell defendants' goods, and nearly always do sell them, when customers do not mention the brand of cola drink they prefer but just ask generally for that kind of drink. This, however, is in no sense a sale of defendants' goods and plaintiff's goods. It is nothing more than sound business policy.

On page 157 of plaintiff's schedules in this statement: "In the following instances bottled 'Koke' was passed off without comment in response to requests for 'Coca-Cola,'" ; and on the next page is a tabulation of the testimony of four of plaintiff's detectives, Hogan, Bogner, Gillon and Wilkins, showing the names and addresses of the dealers in bottled goods from whom they purchased some 35 or 40 bottles of "Koke," together with the dates of the purchases and the pages of the record where the testimony relative thereto may be found.

Plaintiff must have been hard pressed, indeed, for evidence of "fraudulent substitutions" when it had to bolster up its case with testimony of this sort. Not one of these detectives was deceived in the slightest by what he got. Each one of them knew, as soon as he saw the bottle, that it was "Koke" that was being handed out to him, and not "Coca-Cola," and it is plain, from an inspection of the bottles themselves, that anybody would have known so, too.

Clarence J. Hogan and B. J. Gillon, two Pinkerton detectives (Rec., 648, 659) made their purchases together. All told, they found four saloons out of twenty they visited that handed them bottles of "Koke" when they asked for "Coca-Cola." (660). Plaintiff's exhibit



113 to 122, inclusive, represent the bottles they purchased.

CLARENCE J. HOGAN: (Rec., 649):

"We have produced all the 'Koke' that was offered us for 'Coca-Cola.' \* \* \* These purchases here are the only ones as to which we got results. \* \* \* You say you take it for granted we were not deceived when we got it; why sure not. \* \* \* Sure we know what it was when we got it. \* \* \* There were places where we asked for 'Coca-Cola' and they didn't have it, but told us they had nothing but 'Koke.' In such instances as that we didn't take anything, but walked out of the man's place. I haven't the slightest idea how many places of that kind we went into, unless I would refer to my notes, \* \* \* but we did go to a great many places where they told us they had no 'Coca-Cola' and offered us 'Koke.'" (Rec., 649-50).

B. J. GILLON, (Rec., 661-2):

"In each place we went into, we called first for a glass of 'Coca-Cola,' and they served us out of the bottle,—they poured it out of the bottle into the glass,—and we drank from the glass. They gave us a drink, which we drank in each instance. When we drank the drink, we asked for a bottle of that drink under some circumstances, and under other circumstances we didn't ask for it. In each instance I saw the drink which was served to us in the bottle which it was served, and, in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so that I was not deceived at any time by what I drank. In each in-

stance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance I saw it was a bottle of 'Koke' that had been served to me in the glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca Cola.' "

FRANK J. BOGNER, Rec., 652-3):

"Mr. Condon and myself went into a bar-room, called for a glass of 'Coca-Cola,' and they took out a bottle of 'Koke,' poured it in a glass, and we drank a part of it; then we asked them to sell us a bottle to take with us,—a bottle of 'Coca-Cola,'—and they wrapped up a bottle of 'Koke.' \* \* \* We kept that up, I suppose, two or three weeks. Yes, sir, that's all we got. \* \* \* (Some places told us they had 'Koke' and didn't have 'Coca-Cola,'—a great many places told us that,—and, when they offered us 'Koke,' why then we didn't buy it. \* \* \* Yes, sir, we have produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola.' \* \* \* We went to see if we would get a substitute for 'Coca-Cola,' and, when we got it, we got what we were searching for,—got the evidence against him. Of course, when those fellows gave us a bottle wrapped up, we knew we had them." (Rec., 653).

GEORGE H. WILKINS (Rec., 886):

"You ask if I didn't know these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course, I could not

tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew that they were not 'Coca-Cola.'

The mere offering, or selling, of one product to a purchaser when another is asked for does not by any means necessarily constitute unfair competition, nor does it necessarily amount to a sale of the one product "as and for" the other. It is only when *deception* is practiced,—when the purchaser is deceived and thinks he is purchasing and receiving goods of one manufacturer when in he is receiving goods of another manufacturer,—or when there is a reasonable probability of deception, that unfair competition exists. When a purchaser asks for goods of one manufacture, and the vendor presents him, instead, with goods of another manufacture, put up in a package so readily distinguished from the packages in which the goods asked for are usually marketed that the purchaser either knows, or in the exercise of ordinary care ought to know, that the goods he has received are not what he has asked for, then no unlawful substitution or unfair competition has been practiced, but, as said by the Circuit Court of Appeals for the Eighth Circuit in *Walter Baker & Co. vs. Gray*, 192 *Fed.*, 926, the transaction amounts to—

"a proposition to the purchaser to accept that [the goods offered to him] in lieu of what he asked for."

As said by Mr. Justice Clifford in *McLean vs. Fleming*, 96 *U. S.*, 245, (24 *L. Ed.*, 828):

"A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate one from the other."

And as said by Mr. Justice Jackson in *Columbia Mill Co. vs. Alcorn*, 150 U. S. 464 (37 L. Ed., 1144):

“Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary purchaser.”

If the mere offering or selling of goods of one manufacturer to a purchaser who has asked for the goods of another manufacturer, in and of itself constitutes unlawful substitution, or unfair competition, notwithstanding the fact that the respective packages are so readily distinguished from each other that ordinary purchasers using ordinary care to ascertain what they are getting could readily detect an attempted substitution, then it would be unlawful substitution and unfair competition to hand a purchaser who had asked for “Coca-Cola,” a package of “Lydia E. Pinkham’s Vegetable Compound,” or of “Dr. Bell’s Pine Tar Honey,” or a bottle of “Mrs. Winslow’s Soothing Syrup,” or of “Wine of Cardui,” “Iron Brew,” “Moxie,” Sarsaparilla, Root Beer, Jersey Cream or Peruna. A purchaser who was so careless and indifferent as to what he was getting as to accept any of these things for “Coca-Cola,” would no doubt as readily accept an apple for an orange, a cucumber for a watermelon, or a pumgranite for a prune. Such purchasers the law does not protect, nor will it give one manufacturer rather than another a monopoly of their trade by doing more than requiring each manufacturer to so name and dress his product that an ordinary purchaser, exercising ordinary care to ascertain the source of its manufacture, can readily learn that fact by a reasonable examination of its packages. *Coats vs. Merrick Thread Co.*, 140 U. S., 562, 172 Fed., 926; *Centaur vs. Marshall*, 97 Fed 785; *Allen B. Wrisley Co. vs. Iowa Soap Co.*, 122 Fed., 796, (37 L. Ed. 847); *Coca-Cola Co. vs. Glee-Nol Bottling Co.*, 221 Fed., 61.

## SCHEDULE XIV.

### Defendants' Salesmen Have Not Aided, Encouraged, or Induced Retail Dealers to Sell Defendants' Goods As the Goods Of Plaintiff.

Plaintiff called a number of witnesses in an effort to prove that defendants' salesmen had endeavored to induce them to sell defendants' product as and for plaintiff's product, but instead of proving what they had been summoned to prove, they proved the exact reverse. For instance:

E. R. ALBRIGHT, of Albright & Wood, retail druggists, Mobile, Ala. (Rec., 546):

"He wanted to sell a syrup called 'Dope.' \* \* \* He said it was to be supplied when people asked for 'dope,' and that they had the name 'Dope' copyrighted, &c., and that I had just as much right to give a man 'Dope' when he asked for 'dope' as I did to give him Coca-Cola when he asked for 'Coca-Cola,' and he based his argument on these facts,—*he didn't try to sell it as a substitute for Coca-Cola.*"

I. V. WOOD, of the firm of Albright & Wood, Mobile, Ala. (Rec., 566):

"The representative of the Koke Company *did not ask me to come out and substitute this product for 'Coca-Cola.'*"

PIERRE AUGUSTE CAPDAU, retail druggist,

New Orleans, La., (Rec., 644), tells a long story about some man he had never seen before and whom he has never seen since, whose name he didn't get, and the only thing about whom he can remember is that he had a black mustache. (Rec., 666).

No one in the employ of defendants ever had a black mustache. (Rec. 1513; 1573). The only person in this record with a black mustache is plaintiff's chief detective, H. B. Pierce. |

GEORGE C. KERSHAW, a retail druggist, Dallas, Texas, (Rec., 811), tells about the representations made to him by a salesman of some concern in no way connected with the defendants. 'The man who called on him was a representative of the *Coke Company*, of *Pine Bluff, Arkansas*. (Rec., 811), one of defendants' *competitors*.

This is the fourth time plaintiff has quoted this testimony as evidence against defendants. When the attention of plaintiff's counsel was first called to the fact that Kershaw's story concerned a salesman of the *Pine Bluff* company and not of the defendants, plaintiff's counsel readily admitted their mistake in quoting from this testimony. But when the case came up in the Patent Office the mistake was repeated, and it was repeated when the case was tried at New Orleans, and is again repeated here. The only possible inference is that plaintiff is so hard up for evidence to sustain the pretentious title to its schedule five, that it just had to put this quotation in, in order to have something besides the title.

CECIL V. ROGERS, a retail druggist, Dallas, Texas, says:



"I had a call from a salesman representing the Koke Company of Texas, in reference to 'Koke.' The salesman wanted to put in 'Koke' to be served at the fountain. While he didn't exactly make representations to the effect that it could be served for 'Coca-Cola,' he made mention of the fact that when people called for 'coke' give them 'Koke'; and when they called for 'coke,' they were more than likely to mean they wanted 'Koke' than 'Coca-Cola.'"

CHARLES R. SMITH, a retail druggist, Dallas, Texas. (Rec., 746):

"They said if people came in and asked for 'Koke,' just to give it to them."

T. Q. MARTIN, proprietor of the Owl Drug Store, Dallas, Texas. (Rec., 765):

"He came and asked me to sell 'Koke,' and said it was *just as good as* 'Coca-Cola,' from the fact that it was being manufactured at Dallas, and as a patriotic citizen I should sell it, and that I would not be deceiving the customers, because a man should get what he called for,—if he called for 'Koke' that we should have the 'Koke' to give him."

E. B. THOMAS, a confectioner, Dallas, Texas. (Rec., 766):

"You ask if anything was said as to whether or not my customers would be able to tell the difference; well, I don't know exactly on that, but my best recollection on that is that there would be no one that would make any kick on it at all if they called

for 'coke' and we gave them 'Koke,'—there would be no kick on it; that it was a *first-class article*, and that we could sell it *as good as we could 'Coca-Cola.'* "

It is true that Robert Chidsey, a soda dispenser, Mobile, Ala., (Rec., 558), says that one of defendants' salesmen endeavored to get him to sell "Koke" for "Coca-Cola." On cross-examination, however, he said (Rec., 561):

"Yes, sir; I am sure he used the words *in the place of Coca-Cola*' and not *'as a substitute for 'Coca-Cola.'* "

It is plain that this witness did not appreciate the distinction between a proposition to sell "Koke" when "coke" and "dope" were called for, and a proposition to sell "Koke" when "Coca-Cola" was asked for.

This illustrated by Dave S. Bauer, (Rec., 537):

"You ask if anything was said about substituting "Koke" for 'Coca-Cola'; that was one of the first things that he told me, that I could sell 'Koke' and 'Dope,' and that the calls for 'Coca-Cola,' the public wouldn't know it, and couldn't tell the difference.

\* \* \* That is pretty much what he said, I think, after first trying to induce me to buy his syrup, as I understood it, as a *substitute* for 'Coca-Cola.'

\* \* \* I said, 'Well, I am going to see that they do not serve it.' He says, 'How are you going to do that?' Then I showed him a sign on the fountain that said, 'If you want 'Coca-Cola,' please call for it by its correct name; that is the only cola drink we serve at this fountain.' Then, in addition to that, that when a customer *calls for 'Coca-Cola,'*—

that is, when they call for '*coke*' or '*dope*,'—to tell them they want '*Coca-Cola*.' "

Bauer makes it plain that the salesman evidently told him that he could sell "Koke" when "coke" and "dope" were asked for, and he construed that as a proposition to sell "Koke" when "Coca-Cola" was asked for; and, in giving his testimony months later, in endeavoring to repeat what the salesman had said, he used his *own* language and not that of the salesman, and substituted the words "*Coca-Cola*" for what the salesman had said,—"coke" and "dope." And that is evidently how Robert Chidsey came to make the statement that the defendants' salesman told him he could sell defendants' products as and for plaintiff's, because all the other witnesses agree that defendants' salesmen not only were not endeavoring to get dealers to pass off other goods for plaintiff's goods, but were denouncing substitution as a fraud and an evil, and urging dealers not to substitute "Coca-Cola" when "Koke" and "Dope" were asked for. It does not seem reasonable that a salesman would in one breath denounce as a fraud what he was about to ask the dealer to do in the next breath.

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